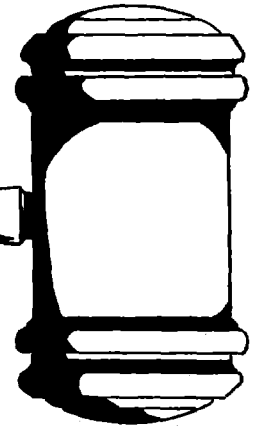


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An Analysis of Army Regulation 27-3, Legal Assistance

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Introduction

Judge advocates have long recognized the need for a new Army regulation governing legal assistance. The old regulation was clearly in need of revision.¹ Many of its provisions either were no longer applicable or needed further explanation or clarification.² More importantly, the Army Legal Assistance Program (ALAP) has moved to the forefront of military legal services as commanders emphasized the need to provide a wide array of legal assistance to serv-

¹U.S. Dep't of Army, Reg. No. 608-50, Legal Assistance (22 Feb. 1974) [hereinafter cited as AR 608-50]. The Army legal assistance program arose during World War II. The War Department issued Circular No. 74 on March 16, 1943, establishing a joint ABA-military program to give legal advice and assistance to military personnel.

²For example, AR 608-50, para 7b, dealt with advising individuals of the application and procedures of the Civil Rights Act of 1964 pursuant to U.S. Dep't of Army, Reg. No. 600-22, Processing Requests of Military Personnel for Action by Attorney General under the Civil Rights Act of 1964 (4 Sep 1969). That regulation was rescinded in April of 1980 by Dep't of Army Circular 310-22.

Consider the fact that AR 608-50, para. 6, contained four separate uses of the word "dependents" in the discussion of persons eligible for legal assistance services. The word "dependents" was not defined in AR 608-50.

ice members.³ Unfortunately, the scope of the old regulation was overly restrictive and inhibited these efforts.⁴ These outdated provisions and shortcomings led to The Judge Advocate General's decision to rewrite the regulation governing legal assistance.

The new legal assistance regulation, AR 27-3, dated 1 March 1984 and effective on 1 April 1984, supersedes AR 608-50.⁵ It combines many of the still useful and relevant provisions of its predecessor with new provisions resulting from policy changes concerning the ALAP and recommendations by staff judge advocates (SJAs) and individual legal assistance officers (LAOs). The regulation is the result of two years of effort, including three drafts; the proposed

final draft was staffed with over thirty-three commands, judge advocates, and separate agencies.

AR 27-3 addresses everything from establishing a legal assistance office to disposing of files and records generated by that office. In addition, it:

Provides the Department of the Army (DA) policy on legal assistance;⁶

Identifies personnel authorized to render legal assistance and personnel eligible to receive it;⁷

Defines legal assistance and the scope of the ALAP;⁸

Specifies the functions of an LAO and the minimum legal assistance services which should be offered;⁹

Grants authority for LAOs to represent qualified personnel in civilian court actions and specifies three methods of initiating civilian court representation under that authority;¹⁰

³Army TJAG Policy Letter 81-3, subject: Army Legal Assistance Program, 15 December 1981.

⁴For instance, AR 608-50, para. 8b, precluded LAOs from aiding service members with military administrative matters. Many of these matters, including requests for reconsideration of claims denials or appeals from findings of pecuniary liability in a report of survey, were areas in which soldiers deserved legal assistance. In fact, many SJAs specifically authorized LAOs to render assistance in these areas. They did so by means of the specific authorization to deviate from the regulation found in AR 608-50, para. 11.

⁵U.S. Dep't of Army, Reg. No. 27-3, Legal Assistance, paras. 1-4, 2-8 (1 Mar. 1984) [hereinafter cited as AR 27-3].

⁶AR 27-3, para. 1-5.

⁷*Id.* paras. 1-6, 1-8.

⁸*Id.* paras. 1-5, 2-1.

⁹*Id.* paras. 2-3, 2-2.

¹⁰*Id.* paras. 2-5, 2-6.

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Provides for the conduct of the preventive law function;¹¹ and

Specifies ethical considerations particularly relevant to the rendering of legal assistance.¹²

A great deal of time and effort went into the drafting of the regulation to insure its brevity as well as its clarity. Nonetheless, as with any new regulation, questions regarding some of its provisions, both old and new, can be expected. This article will present the provisions of the new legal assistance regulation and discuss their intended meaning.

General

Several general observations are in order before continuing with a more detailed discussion of specific provisions of the regulation. To begin, the regulation is printed in the 27 series (legal services) of Army administrative publications rather than the 600 series (personnel) where the old regulation was located. This reflects a change in policy as well as procedure. The proponent of the regulation is The Judge Advocate General (TJAG), and it is primarily directed at attorneys and legal personnel responsible for providing legal assistance services. Moving the regulation to its rightful place in the legal services publication series was the single recommendation most often voiced by SJAs and LAOs.

Supplementation of the regulation is prohibited without the express approval of its proponent, TJAG.¹³ The regulation was drafted in language sufficiently broad to govern legal assistance activities worldwide, whether practiced in a six attorney legal assistance office at a post in the United States or a single attorney brigade judge advocate's office overseas. Despite the proscription against supplementation, SJAs are given maximum flexibility in the conduct of their legal assistance operation. This flexibility is accomplished by means of a specific provision authorizing the SJA to vary the

polices and procedures of the regulation when necessary to accomplish its purpose and to insure effective legal assistance services.¹⁴

AR 27-3 is organized into two chapters. The first chapter, entitled "Introduction," is definitional and explanatory in nature. The second chapter, "Administration of the Army Legal Assistance Program," describes the type and scope of legal assistance services to be provided under the ALAP, as well as the procedures by which these services will be administered. In this article, the specific provisions of AR 27-3 will appear in bold type, followed by a commentary on those provisions in regular type.

Chapter 1 Introduction

1-1. Purpose

This regulation prescribes the Army Legal Assistance Program (ALAP) for providing legal advice and assistance to members of the Armed Forces on active duty and, subject to the availability of resources, to other eligible personnel regarding their personal legal affairs. It also sets forth policy, guidance, and responsibility for the ALAP as well as procedures for providing legal advice and assistance.

Comment

AR 27-3 prescribes and describes the ALAP. It serves as the framework within which the ALAP's purpose of providing legal advice and assistance to members of the armed forces regarding their personal legal affairs will be accomplished. As was the case with AR 608-50, legal assistance services at Army legal assistance offices will be made available to all active duty members of the U.S. Armed Forces. Thus, service members of the U.S. Navy, Air Force, Marines and Coast Guard will continue to be eligible for legal assistance in Army legal assistance offices, just as Army service members are eligible to receive assistance in the legal offices of those services.

Certain other eligible personnel will also be able to receive advice and assistance regarding

¹¹*Id.* para. 2-7.

¹²*Id.* para. 1-9.

¹³*Id.* supplementation instructions.

¹⁴*Id.* para. 1-10.

their personal legal affairs in Army legal assistance offices if resources are available.¹⁵ The primary purpose of the ALAP, however, is to provide legal assistance to the active duty service member. The preference for the active duty service member, while not a new development, is definitively stated in a regulation for the first time. The day-to-day clientele of a legal assistance office will, for the most part, remain unchanged by this stated preference. It is now clear, however, that if a reduction in legal personnel or equipment resources occurs, the active duty service member receives the highest priority.¹⁶

One question frequently asked is whether the regulation may be affected by proposed legal assistance legislation. Over the past few years, the Legal Assistance for Military Personnel Committee of the American Bar Association (LAMP) has worked very hard toward creating a statutory entitlement to legal assistance services. Several U.S. Senate and House resolutions drafted by the LAMP have had varying degrees of success short of enactment. Again in 1983, a measure seeking to create a statutory entitlement to legal assistance for service members was offered.¹⁷ AR 27-3 comports fully with the wording and scope of the proposed legislation.

1-2. References

a. Required publication. AR 340-18-4 (Maintenance and Disposition of Legal and Information Functional Files). Cited in paragraph 2-8.

b. Related publications. (A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.)

(1) AR 1-211 (Attendance of Military Personnel at Private Organization Meetings).

(2) AR 27-10 (Military Justice).

(3) AR 27-40 (Litigation).

(4) AR 140-185 (Training and Retirement Point Credits and Unit Level Strength Accounting Records).

¹⁵See *id.* para. 1-8.

¹⁶*Id.*

¹⁷H.R. 3670, 98th Cong., 1st Session (1983).

(5) AR 340-17 (Release of Information and Records from Army Files).

(6) AR 600-14 (Preventive Law Program).

(7) AR 630-5 (Leave, Passes, Permissive Temporary Duty, and Public Holidays).

(8) AR 635-100 (Officer Personnel).

(9) AR 635-200 (Enlisted Personnel).

Comment

A reference paragraph has been included in the regulation. A reference paragraph lists all required and related publications that are cited in the regulation. Required publications are those a user needs to understand or comply with the regulation. Related publications are merely sources of additional information.¹⁸

1-3. Explanation of abbreviations.

a. ADT - active duty training

b. ALAP - Army Legal Assistance Program

c. AT - annual training

d. DA - Department of the Army

e. IDT - inactive duty training

f. JA - judge advocate

g. JAGC - Judge Advocate General's Corps

h. LAO - legal assistance officer

i. SJA - staff judge advocate

j. RC - Reserve Component

k. SSCRA - Soldiers' and Sailors' Civil Relief Act

l. TDY - temporary duty

m. TJAG - The Judge Advocate General

Comment

A paragraph explaining abbreviations that will appear in the text has been included in the regulation. It lists and explains special terms and abbreviations used in the publication.

1-4. Responsibilities

a. The Judge Advocate General (TJAG). TJAG is responsible for the ALAP. This responsibility includes furnishing information about current developments in the law, model programs, and suggested procedures to legal assistance offices.

¹⁸U.S. Dep't of Army, Pamphlet No. 310-20, Administrative Publication: Action Officer's Guide, para. 3-19 (1981).

b. Commanders authorized to establish legal assistance offices. Commanders empowered to convene general courts-martial and commanders of installations having an Army judge advocate (JA) or Department of the Army (DA) civilian attorney assigned to their staff are authorized to establish a legal assistance office. These commanders should—

- (1) Establish a legal assistance office.
- (2) Insure that adequate office space and facilities are provided for the operation of the legal assistance office.
- (3) Pay periodic informal visits to their legal assistance offices.

c. Legal assistance officer (LAO). LAOs will provide legal advice and assistance to eligible personnel about their personal legal affairs.

(1) Performance of duty as an LAO is an official function of the United States Army.

(2) Actions taken and opinions given on behalf of individual clients reflect the personal, considered judgment of the LAO as an individual member of the legal profession. (See para 2-3a(2).)

Comment

TJAG maintains technical supervision over all persons who render legal assistance under the ALAP. Although certain commanders have the responsibility of establishing a legal assistance office, once that office is established, any judge advocate or DA civilian attorney who provides legal assistance at an Army legal assistance office does so within the purview of AR 27-3 and under the technical supervision of TJAG.

The regulation states that commanders authorized to establish legal assistance offices *should* do so. Whether a commander authorized to establish an office *will* do so is a decision made after balancing the need for legal assistance services with the availability of legal personnel and resources. It must be recognized by all, however, that given the multitude of personal legal decisions facing all individuals today, virtually every location where Army service members are assigned that has a judge advocate or DA civilian attorney *should* be providing legal assistance services.

An officer who has been designated as an LAO and is serving in that capacity is performing the military duties that he or she has been assigned. That duty is an official function of the U.S. Army. Accordingly, any lawsuit of any type directed at the LAO for the performance of these official functions should be defended by the United States. The duty of the LAO, moreover, is to represent and be an advocate for an individual service member. Therefore, the LAO should always insure that third parties are aware of the true nature of the representation being performed by using the standard disclaimer.¹⁹

1-5. Legal assistance policy

Military personnel frequently need legal advice and assistance about personal legal problems. This legal advice is referred to in this regulation as "legal assistance." Personal legal difficulties may cause low morale and inefficiency and may result in problems requiring disciplinary action. Prompt assistance in resolving these difficulties is an effective preventive measure. It is DA policy to provide legal assistance to members of the Armed Forces on active duty or periods of active duty training (ADT) of 30 days or longer and, when resources are available, to other eligible individuals.

Comment

Military personnel are no different from other citizens in a complex society where the subject of legal advice and assistance is concerned. In fact, circumstances inherent to military service, such as frequent moves or absence of the service member for extended periods, serve to increase the need for legal advice and assistance beyond that normally required by the ordinary citizen. Failure to address the service member's need for legal advice and assistance often compounds that individual's problems. Providing legal advice and assistance serves to combat these possibly deleterious conditions before they arise.

The DA policy of providing legal advice and assistance extends first and foremost to the

¹⁹See AR 27-3, para. 2-3, and the comment following that paragraph.

primary client—the service member on continuous active duty or on periods of active duty for training (ADT) for 30 or more days.²⁰

1-6. Legal assistance officers

Except as otherwise indicated, references to the LAO in this regulation include all personnel authorized in this paragraph to be designated as a legal assistance officer, special legal assistance officer, or legal assistance attorney. LAOs include the following:

a. Active Army. Active Army commissioned officers if—

(1) Members of or detailed to the Judge Advocate General's Corps (JAGC).

(2) Members of the bar of a Federal court or of the highest court of a State or Territory of the United States.

(3) Designated by the supervising staff judge advocate (SJA) as a legal assistance officer.

b. Reserve Component (RC).

(1) RC commissioned officers in an annual training (AT), ADT, or inactive duty for training (IDT) status if—

a. Members of the JAGC.

b. Members of the bar of a Federal court or of the highest court of a State or Territory of the United States.

c. Designated by the supervising Active Army SJA as a legal assistance officer.

(2) RC commissioned officers not serving in an AT, ADT, or IDT status if—

a. Members of the JAGC.

b. Members of the bar of a Federal court or of the highest court of a State or Territory of the United States.

c. Designated by TJAG or the TJAG's delegate as a special LAO. Send requests for designation as a special LAO to The Judge Advocate General's School, Department of the Army, ATTN: Reserve Affairs Department, Charlottesville, VA 22901. Retirement points for individual casework may be authorized. (See AR 140-185.)

c. Civilian.

(1) DA civilian attorneys if—

(a). Members of the bar of a Federal

court or of the highest court of a State or Territory of the United States.

(b). Designated by the supervising SJA as a legal assistance attorney.

(2) Personnel in foreign countries employed by the United States on a full or part-time basis to provide assistance on matters of local law who—

(a). Are licensed or otherwise professionally qualified as attorneys under local law.

(b). Have been designated by the supervising SJA as a legal assistance attorney.

Comment

The rendering of legal advice and assistance to service members is an important task that carries with it important responsibilities. Before an individual is allowed to serve as an LAO and render legal advice and assistance, that individual must be fully qualified. The qualifications involved vary to a certain extent, based on the status of the individual—military or civilian, U.S. citizen or foreign national. It should be noted that the requirements placed on active Army commissioned officers preclude a commissioned officer who is attending law school, whether in a fully funded, excess leave, or voluntary basis from being designated as an LAO. These individuals may still see legal assistance clients and aid in the rendering of legal advice and assistance, but they must do so under the direct supervision of an LAO. They serve in a capacity similar to a paralegal and must insure that clients aided by them are informed of their actual status, *i.e.*, that they are not LAOs or attorneys-at-law.

RC judge advocates normally render legal advice and assistance during their two-week annual training (AT) period, periods of ADT, or on weekends or designated evenings while in an inactive duty training (IDT) status as part of a mutual support program. Their duties are performed at the active Army legal assistance office under the direction of the supervising SJA. This paragraph emphasizes the fact that the SJA is responsible for all legal assistance given, regardless of the active duty or RC source.

²⁰See also *id.* para. 1-8.

Under certain circumstances, RC judge advocates not serving in an AT, ADT, or IDT status may render legal advice and assistance to eligible clients under the ALAP. They do so as special LAOs appointed by TJAG.²¹ The duties of special LAOs are not performed under the direction of a supervising active Army SJA, but rather under the direction of TJAG. Normally they render legal advice and assistance to eligible clients in locations distant from an active Army legal assistance office. Typically, these clients include active Army personnel assigned to the Reserve Officer Training Corps or recruiting duties.

1-7. Legal assistance offices

Each legal assistance office established will be designated as either the installation, post, unit, or hospital legal assistance office in orders announcing the establishment and location of the office. SJAs will send a copy of the orders to HQDA (DAJA-LA), WASH DC 20310. The availability of Army and command regulations and directives and of legal references should be considered when determining the location of the legal assistance office. The office will be so constructed as to preserve client confidentiality and to present a professional atmosphere conducive to the conduct of sensitive personal business. Sound deadening materials, such as rugs and drapes, and comfortable coordinated furniture should be used to furnish legal assistance offices.

Comment

LAOs render legal advice and assistance to service members and other authorized personnel in a variety of settings worldwide. The offices they work out of range from quonset huts and altered World War II barracks to standard office settings in modern permanent buildings. The regulation sets forth certain *minimum* characteristics for construction, configuration, and furnishings of legal assistance offices to give legal services to the client in a professional environment. Far *more* than the minimum should be accomplished. The office should be furnished and appointed much the same as the

office of a civilian attorney. This entails utilizing appropriate professional interior decorating and coordinated furnishings. The image projected then is not only more professional but also meets the expectations of the client who seeks legal advice and assistance.

1-8. Persons eligible for legal assistance

a. Legal assistance will be provided to members of the Armed Forces on active duty or on periods of ADT of 30 days or longer. All other categories of eligible personnel will be provided legal assistance if resources are available.

b. The categories of personnel listed below are eligible for legal assistance under the ALAP in the order of priority stated.

(1) Active duty personnel. Members of the Armed Forces of the United States, except RC personnel on AT, ADT for 29 days or less, or IDT.

(2) Family members of active duty personnel. (See (1) above.)

(3) RC personnel. Members of the RCs while on ADT for periods of 29 days or less. These members will be provided legal assistance at the direction of the Active Army SJA for emergencies only.

(4) Family members of RC personnel (see (3) above) at the direction of the Active Army SJA for emergencies only.

(5) Retired personnel. Retired members of the regular components, nonregular or former personnel receiving retired pay for physical disability, and personnel or former personnel of the RCs retired after at least 20 years of active duty.

(6) Family members of retired members. (See (5) above.)

(7) Survivors. Family member survivors of active duty personnel and retired members who would be eligible were the service member or retired member alive.

(8) Civilian personnel. In foreign countries, US civilians (other than local hire) who are in the employ of, serving with, or accompanying the Armed Forces of the United States.

(9) Family members accompanying civilian personnel. (See (8) above.)

(10) Allied service members. Members of allied forces while serving in the United States.

²¹See *id.* para. 1-6b(2).

(11) Family members accompanying allied service members. (See (10) above.)

(12) Discharged prisoners. Prisoners confined in a United States disciplinary barracks even though discharged from the Service.

c. For purposes of eligibility for legal assistance, the term family member as used in this regulation means the following:

(1) A lawful spouse.

(2) Children who are under 21 years of age, unmarried, and who are—

(a) Legitimate or have been legitimized.

(b) Adopted children.

(c) Stepchildren.

(d) Foster and preadoptive children or wards. In the case of wards, the sponsor must possess a legal decree or other instrument issued by a court of law or placement agency awarding custody of the child to the sponsor.

(3) Children who are 21 years of age or over, unmarried, dependent for over half of their support from the sponsor, either incapable of self support because of a mental or physical handicap or have not passed their 23rd birthday and are enrolled in a full time course of study at an approved institute of higher learning, and who are—

(a) legitimate or adopted children.

(b) stepchildren.

(c) wards.

(4) Parents (including father, mother, stepparent, parent by adoption, and parents in law) who are dependent for over half of their support from the sponsor. For the purposes of this regulation, the relationship between a stepparent and his or her stepchild ends if the stepparent is divorced from the parent by blood.

d. Commanding officers responsible for establishing legal assistance offices (see para 1-4b) or the supervising SJA having responsibility for the servicing legal assistance office may deny legal assistance services under the following circumstances:

(1) Services may be denied to categories of personnel otherwise eligible (except for members of the Armed Forces on active duty or on periods of ADT of 30 days or

longer) based on the availability of space and facilities and the capabilities of the legal assistance staff.

(2) Services may be denied for a period not to exceed 1 year to any individual who abuses the privilege to obtain and use legal assistance services. Abuses include, but are not limited to—

(a) Repeatedly missing appointments.

(b) Misconduct in the legal assistance office or in connection with seeking or using legal assistance services.

(c) Using legal assistance services for a purpose prohibited by paragraph 2-4.

An individual denied legal assistance services may submit written explanation or rebuttal to the person responsible for the initial denial decision. That person will consider the submitted explanation or rebuttal in arriving at a conclusive decision. This decision will be final.

Comment

In accordance with the stated purpose and policy of the ALAP, legal assistance will be provided to members of the Armed Forces on active duty or serving on periods of ADT for 30 or more days. These service members are the primary clients for which the ALAP came into existence and for whom it continues to exist. All other persons who are eligible for legal assistance services will be provided those services wherever and whenever possible but only so long as the legal resources of the office can support them.

The term "active duty" personnel, as used in the legal assistance regulation in establishing priority for legal assistance services, excludes members of the RC on AT, IDT, and ADT for 29 days or less except on an emergency basis at the direction of the active Army SJA. RC personnel are specifically tasked with the responsibility of maintaining current pre-mobilization legal requirements. These requirements, such as procuring wills or powers of attorney, must not be neglected until arrival at an installation for periods of AT or ADT. Further, the limited AD period should not be lessened by routine legal needs. RC members will, however, be seen for emergencies. Whether a situation is sufficiently

urgent to require immediate legal assistance services will be determined by the active Army SJA having supervision over the legal assistance office concerned. The same eligibility requirements apply to the family members of RC personnel.

Retired personnel and their family members remain a category of personnel authorized legal assistance services. The definition of "retired personnel" for the purposes of the regulation is the same as used in AR 608-50.²²

Family member survivors of active duty or retired personnel who would be eligible for legal assistance services if the member were still alive have been authorized legal assistance services. AR 608-50 did not authorize these persons to be seen as legal assistance clients.²³ Previously, once the widow or widower passed beyond the auspices of the Survivors' Assistance Program, no further legal assistance could be given.

The remaining categories of personnel eligible for legal assistance services remain unchanged. They have merely been placed in an order of priority for legal services. Those unfamiliar with the ALAP may query why such an order of priority is necessary. It is necessary because there is no statutory requirement that the Army, or any other service, provide personal legal assistance to its service members.²⁴ Other missions of the JAGC may take precedence over the rendering of legal assistance during hostilities or shortages of legal personnel or equipment resources. Missions and requirements that are statutorily mandated *must* be performed; self-imposed regulatory missions and requirements need not be. Should it become necessary to limit the clientele, categories of persons will be denied legal assistance services based on their order of priority in the regulation. Again, the active duty service member is the last category of personnel to be denied legal services and will be denied services only where circumstances preclude the opening of a

legal assistance office altogether or necessitate termination of all legal assistance activities at an existing office.

The determination of whether to deny legal assistance services, be it to a category of otherwise eligible personnel or to an individual, rests with the commander responsible for establishing the legal assistance office and the SJA. An individual initially denied legal assistance for abuse of that service may submit matters in explanation or rebuttal which will be considered by the commander or SJA in arriving at a final decision.

The final change with respect to persons authorized legal advice and assistance in Army legal assistance offices is definitional in nature. As requested by many SJAs and LAOs, the term "family member" has been defined and appears in the regulation.

1-9. Ethical considerations

a. **The Model Code of Professional Responsibility of The American Bar Association.** These rules apply to LAOs except where they are clearly inconsistent with this regulation. Alleged violations of the rules and requests for advisory opinions will be processed according to TJAG's professional responsibility complaint procedures.

b. **Privileged communication.** Communications between attorney and client are privileged. Personnel designated in this regulation as authorized to provide legal assistance will carefully guard the attorney-client relationship and treat all communications and information from the client as privileged. Clerical personnel, as well as personnel with supervisory responsibilities over legal assistance offices, are required to maintain the same strict standards of confidentiality as the LAO. These personnel will be carefully instructed as to the nature and extent of privileged communications. No one may order the breach of the attorney-client relationship. Only the client may authorize the disclosure of privileged matters. Authorization to disclose privileged matters should be made in writing and a copy of it retained by the LAO. Strict observance of the communication privilege is essential to the

²²AR 608-50, para. 6b.

²³*Id.* para. 6.

²⁴But see *supra* note 17 and accompanying text.

ALAP in order to—

(1) Establish confidence in the integrity of its operation.

(2) Assure all personnel, regardless of grade or position, that they may talk frankly and completely about all material facts of their cases to those persons providing legal assistance without fear that their confidences will be disclosed or used against them.

c. Supervision of legal assistance activities. The SJA, the supervising JA or civilian attorney, or other members of the office whom the SJA may designate will supervise legal assistance activities. These individuals perform a role like that of the senior partners in a law firm. These individuals are authorized to review all office administrative activities and procedures.

d. Representation. JAs serving as LAOs perform their duties under the commanders of the commands to which they are assigned or attached. LAOs represent individual clients only to the extent reasonably necessary for the LAOs to perform their assigned duties within the guidelines of this regulation. LAOs may not, without the permission of superiors, represent service members or advise clients so as to enter into attorney-client relationships about matters which are outside the scope of "legal assistance." JAs assigned to the US Army Trial Defense Service may perform duties as LAOs under the supervision of the SJA. (See AR 27-10, para 6-8c.)

Comment

The Model Code of Professional Responsibility of the American Bar Association will continue to be the required ethical standard for all LAOs.²⁵ Procedures for reporting alleged ethical violations or requesting advisory opinions remain unchanged.²⁶

The concept of privileged communication was specifically emphasized for three reasons. First, to remind all LAOs of the ethical constraints in an attorney-client relationship.

²⁵U.S. Dep't of Army, Reg. No. 27-1, Judge Advocate Legal Service, section VI (IC 2, 1 Nov 82).

²⁶*Id.*

Second, to insure that LAOs instruct their subordinates regarding their requirement to strictly comply with ethical standards. Third, because the attorney-client relationship is absolutely essential to the success of the ALAP, especially in the military society with its emphasis on senior-subordinate relationships.

Other ethical considerations were included based on a number of inquiries from LAOs. All legal assistance files and correspondence are available to the SJA or supervising judge advocate just as they would be to senior partners in a civilian law firm. Also, outgoing correspondence directed to third parties represents a release by the client regarding information contained therein. Additionally, proscriptions regarding "gratuitous service" or entering into attorney-client relationships otherwise precluded without TJAG approval are still in force.²⁷

1-10. Authorization to deviate from this regulation

a. Local conditions may at times require changes from the policy and procedures in this regulation to insure that effective legal assistance services are provided. This regulation should be interpreted so that its purpose is accomplished. LAOs, with the approval of the supervising SJA, are authorized to vary the policy and procedures in this regulation when necessary.

b. Variations from this regulation will be placed in memorandum form and kept on file in the legal assistance office. In addition, variations will be promptly reported by memorandum to HQDA(DAJA-LA), WASH DC 20310.

Comment

This paragraph provides the SJA with maximum flexibility over the legal assistance operations under his or her supervision. This flexibility is absolutely essential because of complex variables—ranging from geographic location and number of LAOs assigned to availability of library resources and typewriters—that affect the operation of a particular legal assistance office.

²⁷*Id.* para. 10.

Variations from the regulation are required to be reported to TJAG. In addition, these variations must be reduced to a memorandum and placed in the legal assistance office files so that the LAO performing duties in accordance with a particular variation will not be deemed to be acting outside the scope of the regulation.

Chapter 2

Administration of the Army Legal Assistance Program

The Army Legal Assistance Program

2-1. The Army Legal Assistance Program consists of—

- a. Legal assistance services.
- b. Court representation.
- c. Preventive law. (See AR 600-14.)

Comment

The ALAP consists of three distinct packages of services, two mandatory and one discretionary. Every legal assistance office should provide everyday legal assistance services and have an active preventive law program. Court representation services may be initiated upon the approval of TJAG.

2-2. Legal assistance services

a. LAOs will, as a minimum, make the following services available to eligible clients:

(1) Domestic relations. General advice on the legal and practical meaning of divorce, legal separation, annulment, custody, and paternity will be provided. Representation of both parties in domestic relations cases by LAOs of a single legal assistance office is discouraged. Every effort will be made to refer one of the parties to another legal assistance office or to a local civilian attorney. (See para 2-3b(6)(b).) If referral of one of the parties is not an available option and both parties must be represented by LAOs of a single office, individual client representation and confidences must be maintained. This includes the use of separate files and filing locations as well as separate clerical personnel. Where a matter is uncontested, legal assistance in preparing necessary documents for submission to local courts may be given if permitted by the local jurisdiction.

(2) Wills and estates. Legal advice, counseling, and the drafting of wills, where necessary, will be provided. However, complex estates involving complicated tax and trust provisions will normally be referred to specialists in the civilian community.

(3) Adoptions and name changes. Advice regarding adoption and change of name will be given. Assistance in assembling necessary documentation and, if appropriate in the local jurisdiction, preparing pleadings may be provided.

(4) Nonsupport and indebtedness. Individuals will be given counseling and advice about claims pending against them. Advice and assistance will also be provided to personnel wishing to make complaints of nonsupport or indebtedness. Written correspondence, telephone contacts and referral to other sources of assistance may be accomplished on behalf of the client.

(5) Taxes. Individuals wanting tax guidance should get initial assistance from unit tax officers. LAOs will give general advice and assistance about Federal, State, and local taxes. Tax forms may be made available for filing returns and related petitions and appeals. LAOs are authorized to complete income tax forms when the client, after appropriate guidance, is unable to personally complete them. However, LAOs are specifically prohibited from signing as the paid preparer of tax forms. Clients who want actual "preparation" of their tax forms will be referred to local civilian tax services. Tax information and training sessions, including those conducted by Federal and State tax authorities, may be sponsored on military installations.

(6) Landlord-tenant relations and consumer affairs. Legal advice and assistance will be provided individuals in these areas of law. Leases may be drafted as long as such action does not violate paragraph 2-4c.

(7) Civil suits. General advice may be given in civil suit matters even though, in most cases, representation in court is prohibited. The procedures and requirements of small claims courts and other courts of limited or special jurisdiction will be explained in detail. Referral to a civilian

attorney will be made if required.

(8) **Soldiers' and Sailors' Civil Relief Act (SSCRA).** Individuals will be provided detailed advice and counseling concerning the provisions of the SSCRA. Correspondence and documents will be drafted for the individual's protection under the SSCRA.

(9) **Other services.** Assistance will be given to personnel in matters dealing with powers of attorney, naturalization, citizenship, and insurance. This assistance may include correspondence and document preparation, or it may be limited to office advice on statutes and regulations that apply to the situation.

b. Assistance may be given to individuals having personal legal difficulties in areas of the law other than those listed in *a* above. The SJA will determine if assistance is authorized and whether office resources, personnel, and expertise are sufficient to support the additional services.

Comment

The legal areas delineated above are those in which the service member and family members are most likely to experience problems. The listing of services to be offered in particular subject areas, unless stated otherwise, are minimums.

In some areas, the extent of representation that can be provided by LAOs is limited. For example, in the area of estate planning and wills, the regulation states that complex cases will normally be referred to specialists in the civilian community.²⁸ This limitation is imposed to protect both the LAO and the client. Many LAOs do not have the expertise required for complex work in this area. Further, even if a particular LAO does have the necessary expertise, the continuing relationship so essential to complex estate planning cannot be achieved. When both the client and the attorney are relocated about every three years, the continued representation required for estate planning is difficult to maintain. It is, however, imperative that LAOs are familiar with estate planning issues in order to decide when a client should seek specific advice elsewhere.

²⁸See AR 27-3, para. 2-2a(2).

Some jurisdictions allow parties to submit simple pleadings and agreements on their own behalf, even if the documents were prepared at a legal assistance office with the help of an LAO. In those jurisdictions, the LAO can and should aid the client. In other jurisdictions, local courts view the same situation as the practice of law in their courts by an out-of-state attorney. Obviously in those jurisdictions, the LAO will not be able to provide this service for the client. In all cases, however, SJAs and LAOs should establish cordial relationships with local courts, fully describing the scope of their activities on behalf of service members.

Note that paragraph 2-2a(1) strongly discourages LAOs of the same office from representing both parties in a dispute. The American Bar Association's Committee on Ethics and Professional Responsibility recognizes that circumstances may dictate that opposing parties be represented by attorneys from a single military legal assistance office.²⁹ When this occurs, the ABA recommends that totally separate facilities be afforded the opposing attorneys.³⁰ In order to preserve client confidences and insure total privacy, this should include separate files and separate clerical/paralegal personnel. More important, however, than the recognition that such representation may be necessary, is the Committee's advice that "joint representation by the same office should be avoided."³¹ This is the position advocated by TJAG and AR 27-3.

2-3 Legal assistance officer functions

In providing the legal assistance services noted above, LAOs will perform the following functions:

a. Office counseling. Office counseling consists primarily of providing legal advice to a client. LAOs are also authorized to negotiate with adverse parties and to perform all professional functions short of actual court appearances. These functions include pre-

²⁹ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1235 (1972).

³⁰*Id.*

³¹ABA Comm. on Ethics and Professional Responsibility, Formal Op. 343 (1977).

paring and executing appropriate legal documents and educating and aiding clients with pro se representation. Pro se representation aid may include preparing documents (if appropriate in the local jurisdiction) and signing letters on behalf of clients.

(1) The LAO providing legal assistance to an individual develops an attorney-client relationship with that individual and represents that client zealously within the bounds of professional ethics.

(2) Whenever an LAO gives an opinion or states a conclusion of law on behalf of a client to a third party, the LAO will insure that the third party is advised that the LAO acts on behalf of the client and not as a representative or official of any headquarters, the United States Army, or the United States Government. This advisement will appear in the text of any letter or written communication that requires it. The following wording is suggested:

This letter is written on behalf of my client, _____. It reflects my personal considered judgement as an individual member of the legal profession. It is not to be construed as an official view of the United States Army or the United States Government.

b. Case referral. LAOs may refer clients to other attorneys or other agencies whenever circumstances indicate that referral would be in the best interest of the client. The following factors should be considered when determining whether referral is appropriate.

- (1) Individual attorney workload.
- (2) Availability of personnel or resources.
- (3) Attorney expertise in specific areas of the law.
- (4) Waiting time for an appointment.
- (5) Services otherwise prohibited by this regulation.

(6) Availability of agencies or attorneys for referral. Case referral to attorneys may be made in the following ways:

(a) Military referral. Case referrals to attorneys within the Armed Forces should be considered before referral to a civilian attorney is considered. The best interests of

the client are served by military referrals using intra-office, inter-office and cross-service referral as well as RC JAs. (See para 1-6b.)

(b) Civilian referral. Case referral to members of the civilian bar should be made, as appropriate, to the client's family attorney, civilian legal organizations (such as public defender, local bar referral agency, legal aid), and individual legal practitioners. If referrals to civilian attorneys are made, it is important to make sure that quality legal services (with a minimum financial burden to the service member) and competent representation are achieved. Care must be taken to avoid the appearance of favoritism by constantly referring legal assistance clients to one particular attorney or to an unreasonably limited number of attorneys.

(c) Prohibited referral. Once an LAO has talked individually and substantively with a client, that LAO is prohibited from later representing that client in a private capacity for a fee about the same general matter. LAOs are not permitted to refer a client to another attorney expecting to receive actual or constructive compensation or benefit for the referral.

c. Liaison. Liaison with Federal, State, and local bar programs should be established and maintained. Membership in professional organizations, especially local branches involved in providing legal services pertinent to the military community, is encouraged. Attendance at professional meetings and seminars is also encouraged. LAOs may attend meetings or private organizations at government expense (See AR 1-211) or while on permissive temporary duty (TDY). (See AR 630-5.)

d. Direct communication. LAOs at any and all levels are authorized and encouraged to communicate directly with each other whenever necessary and appropriate to promptly resolve a client's problem or to further the ALAP. The Legal Assistance Branch of the Administrative and Civil Law Division at the Judge Advocate General's School in Charlottesville, Virginia, is available to aid LAOs in the field. Questions about DA policy and requests for opinions from

TJAG should be made in writing to HQDA(DAJA-LA), WASH DC 20310).

Comment

The definition of "office counseling" continues to include "all professional functions short of actual court appearances." Where the local jurisdiction will accept documents and pleadings prepared at the legal assistance office and offered by the client in a pro se status, those documents and pleadings may be prepared by the LAO.³²

Although LAOs form attorney-client relationships with individual clients, they communicate with third parties who may be unaware of this relationship. Accordingly, LAOs must insure that these third parties are aware of the nature of the representation. This is especially important with regard to letters written on behalf of clients. Normally, official stationary complete with the official heading is used by LAOs. Unknowing persons receiving such letters have in the past mistakenly believed that LAOs were corresponding on behalf of the U.S. Army, the pertinent headquarters, or the commander. The duty to advise third parties of the nature of the representation is mandatory. Any suitable phrasing which accomplishes this duty is satisfactory. Suggested wording for advising third parties of the true nature of the representation has been included in AR 27-3, para. 2-3a(2).

Referral of clients to civilian attorneys whenever appropriate is specifically authorized. Competent representation of a client demands that referral, when made, be accomplished in a competent manner also. LAOs who are unfamiliar with the local bar and its membership should rely on bar referral agencies or other local referral aids. The LAO who is familiar with the local bar and its membership should refer the client to individual civilian attorneys as appropriate. It is unprofessional and unethical to refer clients to specific attorneys for any reasons other than knowledge of the attorney's competence and belief that that particular

attorney is the best person to undertake the representation.³³

RC LAOs must be extremely careful not to "cross over" a client from their military legal assistance practice to their normal civilian practice. In addition, the proscriptions of the regulation regarding actual or constructive compensation for a referral requires specific attention on the part of RC LAOs referring clients to their civilian counterparts.

2-4. Limitation on legal assistance services. The ALAP is established for the specific purpose of providing legal advice and assistance on personal legal problems to eligible personnel. There are matters outside the scope of personal legal problems upon which LAOs are prohibited from giving legal advice and assistance. These include the following:

a. Criminal matters. Persons accused or suspected of criminal offenses sometimes request advice from an LAO. In such cases, the individuals should be informed of the proper procedure for getting a defense counsel. Individuals requesting assistance on a military criminal matter will be referred to the US Army Trial Defense Service. Individuals requesting legal assistance on a criminal matter that is within the jurisdiction of civilian courts will be referred to a civilian attorney according to paragraph 2-3b(6)(b).

b. Military administrative matters.

(1) LAOs will not give legal opinions about military administrative matters. Administrative law opinions are the responsibilities of other staff sections or other lawyers in the SJA office. LAOs are prohibited from representing individuals in any administrative elimination actions and before any administrative elimination boards unless directed to do so by the SJA. (See AR 635-100 and AR 635-200.) LAOs may help individual service members prepare rebuttals to other administrative determinations with the approval of the SJA. These rebuttals include actions such as appeals to reports of survey

³²See comment following *supra* AR 27-3, para 2-2.

³³Model Code of Professional Responsibility Canon 2 (1979).

and physical evaluation board determinations.

(2) Individuals seeking to file claims against the United States will be sent to the Claims JA who will advise those individuals according to applicable claims regulations. The LAO may only advise a claimant on whether to accept an award, request reconsideration, or file an appeal under a claims statute that provides exclusively an administrative remedy. Examples are the Military Personnel and Civilian Employees Claims Act or the Military Claims Act.

(3) LAOs will not represent a client on a claim or rebuttal after available administrative appeals have ended. The client will be referred to the civilian bar for judicial or other remedies outside those of an administrative nature. In Federal Tort Claims Act cases, LAOs may discuss procedural aspects of administrative remedies with the client but are specifically prohibited from discussing the merits or the value of such a claim.

c. Private income-producing business activities. LAOs will not render legal advice and assistance to individuals about income-producing business activities. Only problems of a personal nature are to be addressed in the ALAP.

Comment

Criminal matters, both military and civilian, are beyond the scope of the ALAP. Individuals requesting representation in a criminal matter will be referred to appropriate military or civilian attorneys by the LAO. This proscription is not intended to preclude the LAO from an educational or counseling role prior to the referral. For instance, in a jurisdiction that views traffic tickets as criminal matters, the LAO could educate an individual with regard to the local court or magistrate system, court costs, and traffic point system. That LAO, however, may not undertake representation of the individual, be it at a local traffic court appearance or negotiations with local traffic court personnel. Offices with specific needs can seek exception from this prohibition through means of AR 27-3, para. 1-10.

The regulation allows the LAO to represent individuals in many military administrative

matters that were previously considered to be outside the scope of legal assistance. Rebuttals to certain administrative actions, such as a request for reconsideration of a finding of pecuniary liability in a report of survey, or assistance in rebutting an adverse efficiency report may be undertaken *upon the approval of the SJA*. Certain representation in the claims area is now specifically authorized. LAOs must insure that a client is advised at the outset of the express limitations on representation. LAOs must be extremely careful in the claims area to abide by the limits of representation stated in the regulation. LAOs will not represent clients in legal actions against the United States.

2-5. Court representation.

Certain LAOs may represent qualified service members in local civilian courts. This paragraph sets forth requirements, policies, limitations, and procedures for initiation of such representation and guidelines for LAOs providing representation in court.

a. Policy.

(1) It is DA policy to insure that maximum legal assistance services are made available to all eligible service members. Some service members cannot afford the services of a civilian attorney for representation in local courts without causing substantial financial hardship to themselves or their families. Active Army LAOs (see para 1-6a) are authorized to appear in local civilian courts on behalf of qualified service members under the three court representation methods set forth in paragraph 2-6.

(2) Representation in local civilian courts will be made available only as long as personnel and resources permit. The SJA is authorized to decline to initiate or to discontinue court representation services upon deciding that—

(a) Personnel or resources are not sufficient to support court representation.

(b) Participation in court representation detracts from the quality or availability of the normal legal assistance services offered.

b. Limitations.

(1) Court representation is established for the specific purpose of helping service members eligible for legal assistance servi-

ces who cannot afford a civilian attorney for representation in court. The following limitations (in addition to those set forth in para 2-4) are placed on client eligibility for representation in court.

(a) **Financial hardship.** Representation in civilian courts is available only to those clients eligible for legal assistance services under the ALAP and for whom hiring civilian representation would have a substantial financial hardship upon themselves or their families. The SJA will determine whether a client satisfies the substantial financial hardship test on a case-by-case basis. Normally, single service members in the grade of E-3 and below and married service members in the grade of E-4 and below will qualify for court representation if they have no other income except their military pay. Service members above the grade of E-4 will be required to provide full documentation of substantial financial hardship in order to qualify for court representation.

(b) **Active duty members.** Unless prior approval of TJAG is obtained, court appearances are limited to the representation of qualified active duty service members. This limitation is intended to prevent the Active Army LAO from representing a family member who is pursuing a legal action against an active duty service member of the Armed Forces. It is not intended to prevent representation of a family member who is acting on behalf of a service member on active duty, if the member has designated the family member as his or her agent while the service member is hospitalized, serving an unaccompanied tour, or serving under other special circumstances (such as extended TDY) making court appearance by the service member impractical.

(c) **Litigation against the United States.** Active Army LAOs will not represent individuals who seek to bring court action against the United States or a US agency or official. Should the circumstances of a particular case indicate that representation by a military LAO may be appropriate, the supervising SJA must obtain prior approval for such representation from TJAG. (See AR

27-40, paras 1-3 and 1-4.) This requirement does not apply to noncriminal Federal income tax matters, bankruptcy proceedings, and representation of clients in non-criminal actions before United States Magistrates. Full court representation in these types of cases is authorized.

(d) **Fee generating and prepaid representation.** Cases which normally would be accepted by a civilian practitioner on a contingent fee or other inherent fee generating basis and cases where some other individual, business organization, or party is obligated to provide the client with an attorney at no cost to the client will be referred to the civilian bar.

(e) **Criminal actions.** Court representation services are limited to matters of a civil nature. Active Army LAOs will not represent clients in criminal actions (whether felony or misdemeanor) in court.

(2) The objective of the court representation services is to provide full representation to qualified eligible clients. Court representation is provided in addition to normal legal assistance services. (See para 2-2.)

Comment

The court representation services offered under the ALAP are not mandatory; each SJA has the option of initiating these services upon approval by TJAG. Whether such approval is initially sought will depend, for the most part, on the circumstances then present in the legal assistance operation of the requesting office. Obviously, the on-post legal assistance services must be of high caliber and the office sufficiently staffed to justify initiation of the court representation services.

The SJA determines whether an individual satisfies the financial hardship requirement on a case-by-case basis. Normally, the criteria to be used in determining financial hardship will be that recognized and utilized by the jurisdiction concerned. There is no rank or grade limitation associated with court representation services.

Court representation services are limited to the active duty service member. Family members may be represented in court under certain circumstances, but only after receipt of TJAG approval.

2-6. Court representation methods

Active Army LAOs may represent qualified service members in local civilian courts under any one or a combination of the following methods:

a. State approved agreement. This method continues the representation currently being provided in some jurisdictions either under written agreements with the State bar association or by a motion granted by the highest court of the State concerned. Under these agreements or orders, Active Army LAOs who are not members of the State bar concerned are allowed to appear in court on behalf of qualified service members. This court representation method may be used in States not currently permitting it if—

(1) The SJA determines that sufficient personnel and resources are available to support court representation services.

(2) TJAG determines that a court representation service should be made available within the jurisdiction concerned and gives permission to initiate an agreement with the State bar association or to present a motion to the highest court of the State concerned.

(3) TJAG approves the agreement with the State bar association or the terms of the motion granted by the highest court of the State.

Send requests for TJAG's determination and approval to HQDA (DAJA-LA), WASH, DC 20310.

b. Reserve cooperation.

(1) Active Army LAOs may appear in local civilian courts as associate counsel when the Active Army LAO is accompanied by and under the supervision of an RC JAGC attorney who is—

(a) A member of the local bar.

(b) The attorney of record.

(c) Designated as a special LAO by TJAG. (See para 1-6b(2).)

(2) Under this method, maximum use will be made of clerical support and supplies available in the legal assistance office. The service member client will be responsible for paying only court costs and filing fees. Only in rare instances and when specifically

authorized by the SJA should clerical support be provided by the reservist's civilian secretarial personnel. When civilian clerical support is authorized, the reservist may recover only actual out of pocket expenses in addition to court costs and filing fees from the military client. Participation by a JAGC reservist in this representation as a special LAO entitles the reservist to be awarded retirement points. (See AR 140-185.) This court representation method may be established if—

(a) The SJA determines that sufficient personnel and resources are available to support the representation service.

(b) TJAG determines that a court representation service should be made available within the jurisdiction concerned and gives permission to initiate this representation service.

(c) JAGC reserve attorneys who have been appointed as special LAOs are available and willing to sit as attorney of record in their local civilian courts.

(d) Coordination has been made with the local bar association.

Send requests for TJAG's determinations and permission to HQDA (DAJA-LA), WASH DC 20310.

(3) Special LAOs, who are members of their local bar in good standing, may represent qualified service members in local civilian courts without an active duty military attorney when—

(a) The service member to be represented is located more than 40 miles from a military post.

(b) The nearest SJA has determined that active duty personnel or resources are not available to support the reserve cooperation court representation method.

c. Qualified bar member

Active Army LAOs who are members of the bar of the State in which they are assigned may represent qualified service members in local civilian courts if—

(1) The SJA determines that sufficient personnel and resources are available to support the representation service.

(2) TJAG determines that court representation services should be made available

within the jurisdiction concerned and gives permission to initiate this representation service.

(3) The Active Army LAOs involved maintain current bar membership and qualification.

(4) Coordination has been made with the local bar association. Send requests for such determination and permission to HQDA(DAJA-LA), WASH DC 20310.

Comment

Participation as an attorney in court representation services is limited to active Army LAOs. Participation by DA civilian attorneys or by RC judge advocates on AT, ADT or IDT is not authorized.

The state-approved agreement method of court representation is a continuation of those programs authorized and currently existing under the expanded legal education program (ELAP). SJAs of jurisdictions not currently participating in such a program may wish to initiate one. Approval to do so must be obtained from TJAG before approaching the state bar or the highest court of the state.

Participation by RC judge advocates in the reserve cooperation court representation method is totally voluntary. Again, TJAG approval is required before an SJA may initiate this court representation method. Since this method utilizes RC members of the local bar, coordination with that bar is essential to the existence and operation of this method of representation.

Current TJAG personnel policy is to assign at least one judge advocate to each major installation who is a member of the bar of the state where the installation is located.³⁴ This assignment to the state of the individual's bar carries with it a requirement that the JA serve as an LAO at that location for at least one year. These JAs are fully qualified to practice before the local bar with TJAG's authorization. The qualified bar member method of providing court representation recognizes these facts. The SJA

who has an attorney on the staff who is a member of the local bar and who receives permission to initiate court representation services, may do so. Coordination with the local bar is still important.

2-7 Preventive law

This paragraph describes the preventive law services to be provided under the ALAP. It prescribes requirements, policies, and procedures for JAs providing preventive law services.

a. Policy. Providing effective preventive law services will decrease the volume of personal legal problems facing military personnel and their families. Preventive law service will result in a saving of man-hours now used for remedial legal assistance counseling. In some instances, these services will save man-hours now being used for the processing of adverse administrative actions and courts-martial.

b. Guidelines.

(1) LAOs will prepare and participate in the active preventive law functions of publicity, education, and training to insure that service members and their families are informed at a minimum about the following legal information:

(a) Counseling services available through the ALAP.

(b) The importance of seeking legal advice before taking action that may lead to adverse civil involvements; for example, before signing purchase agreements, contracts, leases, or divorce settlements.

(c) The rights and privileges granted by laws made to assist the service member.

(d) The rights and privileges of services members and their families as consumers.

(2) LAOs are encouraged to cover additional subject matter in providing preventive law services.

(3) LAOs will make an aggressive and continuous effort to insure that active duty members of the Armed Forces and their families are adequately prepared in the event of a deployment.

c. Combat readiness. The LAO performs an important function in insuring the combat readiness of a unit in the event of—

³⁴JAGC Personnel Policies, para. 6-3 (Oct. 1983).

(1) Exercises. During readiness exercises, the LAO will educate and advise service members concerning legal documents the service members may need. Appointments will be made for those individuals who require further legal counseling and drafting of legal instruments. Simple documents may be drafted during a readiness exercise if time and conditions permit.

(2) Deployment. In the event of an actual emergency deployment, the LAO will educate and advise service members concerning legal documents the service members may need. The LAO will draft simple instruments that can be completed and executed during the deployment processing. Follow-up measures should be taken to insure that individuals provided with instruments under deployment conditions consult the LAO upon their return from deployment so that more complete legal counseling may be given.

d. Legal determinations. Under all circumstances, the client, following consultation with a LAO, will make the decision whether a document or instrument should be prepared and executed. Documents such as wills and powers of attorney will not be prepared unless the LAO determines that they would be legally appropriate under the particular circumstances.

e. RC premobilization counseling. Premobilization legal counseling programs are also an important part of readiness for RC personnel. These programs are not an aspect of the ALAP. RC JAs give premobilization counseling to RC personnel according to applicable FORSCOM mobilization and deployment directives.

Comment

A paragraph on preventive law has been added to the regulation. Preventive law is essential to the ALAP and certain minimum functions must be provided.

RC premobilization counseling is a function performed by RC legal personnel under FORSCOM mobilization and deployment directives, not the ALAP.

2-8. Administrative procedures

This paragraph describes the recording and reporting requirements of the ALAP.

a. Files and records.

(1) DA Form 2465 (Legal Assistance Interview Record). A record will be kept of the—

(a) Name, grade, organization, and address of each person given legal assistance.

(b) Name of the LAO consulted.

(c) Date of consultation.

(d) General subject matter of the consultation.

(e) Name of the individual or agency to which a referral, if any, was made.

The record will be kept on DA Form 2465 and will be filed alphabetically. See figure 1 for an example of a completed DA Form 2465.

(2) Legal assistance case files. A temporary file will be kept on each client being represented. Documents originating in the legal assistance office, including correspondence, memoranda, and notes of the LAO, will be kept in the client's file. Copies of the above items should be given to the client. Whenever possible, papers, documents, and other materials provided by the client should be returned to the client immediately or when the representation ends. The client should be instructed to keep a complete file of all documents and to return this file to the LAO if the client needs additional assistance in the future.

(3) Control of privileged material. Information in legal assistance files and records includes matters which are privileged and protected under the attorney-client privilege. The materials, information, files, and records in each case are available only to the LAO rendering the legal assistance, the SJA (see para 1-9c), those professional colleagues and clerical personnel working on the case, and the client. The LAO will supervise the filing of documents and their use as precedent and decide the disposition (including destruction) of any papers or records of privileged information in any case that the LAO is giving legal assistance. Files containing privileged matter such as DA Form 2465, correspondence, and law-

yers' notes will be kept separate from other files in the office of the staff, hospital, post, or unit judge advocate. These files will be locked in a secure container whenever the office is unattended. Files which are not to be returned to the client or which are withdrawn for reference or precedential use will be disposed of according to AR 340-18-4. A document withdrawn for reference or precedential use will have all identification of the client removed from the document.

(4) Nonprivileged material. All legal administrative and other nonprivileged files will be disposed of according to AR 340-18-4. The release of nonprivileged information to the public is controlled by AR 27-40 and AR 340-17.

b. Reports.

(1) Legal Assistance Operations Report (RCS JAG-73). At the direction of TJAG, a report will be rendered on the operation of each legal assistance office. This operations report—

(a) Will be formulated from information normally available on Legal Assistance Interview Records.

(b) Will be prepared for each legal assistance office.

(c) Will be transmitted in duplicate to HQDA(DAJA-LA), WASH DC 20310.

(d) Will be prepared, cover periods, and be due in accordance with guidance published by TJAG.

(2) Final Operations Report. A final report will be submitted to HQDA(DAJA-LA), WASH DC 20310 when a legal assistance office closes. This report will supply the information required by the last report preceding the closing of the office. It will cover the period between the latest report rendered and the final report.

Comment

The Legal Assistance Interview Record (DA Form 2465) has been redesigned. The new form incorporates much from its predecessor and adds features requested by LAOs. It also incorporates the required Privacy Act statement in a tear-away format. The bottom of the card, containing the Privacy Act information, is removed and given to the client upon receipt of the

required personal information. Existing supplies of the old DA Form 2465 will continue to be used until supply is depleted.

Many offices keep accurate statistics regarding case load by type and numbers of clients. Some do not. There has been no requirement to keep legal assistance statistics since 1974.³⁵ A reporting requirement is established by the new regulation and reports will be rendered in accordance with separate guidance to be issued by TJAG.

It should be noted here that the reported statistics will be used to determine what legal work is being done for whom. They will enable an accurate depiction of both legal assistance clients and the actual numbers and types of legal assistance cases being handled as well as identification of those areas of the law requiring additional training and support to aid LAOs in the field. The statistics will be used to constantly evaluate and improve the ALAP. They will *not* be used to compare numbers of clients seen at different offices. Such a comparison would be meaningless given the many variables affecting each particular office.

Conclusion

The decision to rewrite the Army regulation governing legal assistance was made in the spring of 1981. Some work on a first draft had been completed by October when the 1981 Worldwide JAGC Conference opened at The Judge Advocate General's School, Army, in Charlottesville, Virginia.

During a conference seminar attended by The Assistant Judge Advocate General, several SJAs discussed the legal assistance services provided by their offices. A pronounced disparity was noted between those services. One office, by virtue of being located at a post in a "friendly" jurisdiction, was able to draft simple instruments for submission by their clients in local court and to initiate and establish an expanded legal assistance program. Another

³⁵When AR 608-50 was published in 1974 it superseded AR 608-50 (1968). The latter contained a yearly reporting requirement for legal assistance statistics. The former deleted that requirement.

office, under more adverse local conditions, could provide neither of these services. The conversation quickly turned to an inquiry regarding just how broad should be the scope of legal assistance services offered. The Assistant Judge Advocate General was of the opinion that in providing legal assistance services to our soldiers, with due regard to the particular office's capabilities and the acceptance or rejection of the local jurisdiction, "We'll take all we can get!"³⁶ That single statement set the tenor for the rewrite of the regulation.

³⁶Remarks by Major General Hugh R. Overholt, The Assistant Judge Advocate General at the 1981 Worldwide Judge Advocate General's Conference, Charlottesville, VA.

AR 27-3 provides each SJA with the flexibility to offer maximum legal assistance services. Barring an unsympathetic local bar, there are few limits to the scope of services that can be provided. AR 27-3 places emphasis on providing legal advice and assistance to active duty service members; it calls for insuring that the good soldier and his or her family members experience a higher quality of life by virtue of a valuable Army benefit—free legal services; it provides for a preventive law program; and, it institutes increased court representation services for those service members who truly need them. The regulation provides the general guidelines within which the ALAP will be administered, while insuring sufficient flexibility so that whenever and wherever possible an SJA can "take all we can get."

The Randolph Sheppard Act: A Trap for the Unwary Judge Advocate

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Senator Stafford: "The GAO report suggests that the Department of Defense and its constituent service branches have not in the past been sensitive to or interested in the blind vendor program. Would you agree that that has generally been the case?"

General Benade: "Yes sir, Senator, I would. Unfortunately there has been very little publicity concerning the blind vendor program....I do not think the military departments, Senator, are insensitive, but I am not very proud of our record, and I think we can do better, and we will."¹

¹*Randolph-Sheppard Act for the Blind, Amendments of 1973: Hearings on S. 2581 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 101-02 (1973) (statement of LTG Leo E. Benade, Deputy Assistant Secretary for Military Personnel Policy, Dept. of Defense) [hereinafter cited as 1973 Hearings].*

Introduction

When you think of renovating buildings, opening a new cafeteria operation, or putting a quarter in a vending machine, you automatically think of blind vendors and the Randolph-Sheppard Act²...right? If not, you may be overlooking statutory and regulatory provisions³ which impact upon a significant number of contract law and administrative law actions on your military installation.

The Randolph-Sheppard Act generally mandates that federal agencies controlling federal property will provide the blind:

²20 U.S.C. § 107 (1976).

³See generally 32 C.F.R. § 260.1-260.6 (1981); Dep't of Defense Directive No. 1125.3, Vending Facility Program for the Blind on Federal Property (7 Apr. 1978) [hereinafter cited as DOD Dir. 1125.3]; U.S. Dep't of Army, No. 210-25, Vending Facility Program for the Blind on Federal Property (1 Jan. 1979) [hereinafter cited as AR 210-25].

Priority in the establishment and operation of vending facilities;⁴

Priority in the award of contracts to operate cafeterias;⁵

Satisfactory sites on newly acquired or renovated property to conduct vending operations;⁶ and

Outright payment of certain income from vending machine operations on the installation.⁷

Notwithstanding LTG Benade's identification of the problem and promise of improvement in 1973, the fact remains that the Randolph-Sheppard Act is underpublicized in the military. The attorney who fails to recognize situations where the Act applies not only may be subject to personal embarrassment, but may also create very costly litigation for the United States.⁸

The purpose of this article is to discuss the application of the Randolph-Sheppard Act to military installations and highlight areas of potential litigation. The goal is not to make the reader an expert on the details of the Act's administration, but rather to focus on the general principles which enable counsel to identify issues impacting upon installation legal problems.

Legislative History

Like many legislative matters, the original Randolph-Sheppard Act began as a modest, uncomplicated statute which was designed to promote a worthwhile cause and which made imminent sense in the context of the times. The forces of bureaucracy, attorney scrutiny, and the march of time have transformed the once simple Act into a cobweb of statutory and regulatory requirements engendering many yet to

be resolved legal issues. An understanding of the historical development is essential for an appreciation of the Act's requirements and an insight into potential issues.

The 1936 Act

Passed on 20 June 1936, the original Act covered less than two pages of text and merely authorized blind vendors to operate vending stands in federal buildings.⁹ Although Representative Randolph's original proposal was to require all suitable federal buildings to provide a site for blind vendors, the mandatory language was deleted based on the objection of Secretary of the Interior Harold L. Ickes.¹⁰ Instead, agency heads were given the discretion to exclude blind vendors from their buildings if vending stands could not be "properly and satisfactorily operated by blind persons."¹¹ Federal responsibility for administering the program was assigned to the Office of Education in the Department of the Interior, which in turn designated state commissions or agencies in each state to actually perform the licensing functions.¹² The selection of the location of the stand, the type of stand, and even the issuance of the license itself, were all subject to the approval of the federal agency in charge of the building.¹³ All of these provisions of the original Act were substantially changed by amendments in 1954 and 1974. The one constant which has persisted is the legislative purpose of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting."¹⁴

⁹ Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559 (1936) (amended 1954, 1974) [hereinafter cited as 1936 Act].

¹⁰ S. Rep. No. 937, 93d Cong., 1st Sess. 5 (1974) [hereinafter cited as S. Rep. 937]. See also the letter from Secretary Ickes, reprinted in H.R. Rep. No. 1094, 74th Cong., 1st Sess. 2 (1935) [hereinafter cited as H.R. 1094].

¹¹ 1936 Act § 1.

¹² *Id.* § 2.

¹³ *Id.* § 2(b).

¹⁴ *Id.* § 1. The provision still exists in the Act and is found at 20 U.S.C. § 107(a) (1976).

⁴ 20 U.S.C. § 107(b) (1976).

⁵ *Id.* Note that cafeterias are included within the definition of "vending facility." See *id.* § 107e(7).

⁶ *Id.* § 107a(d)(1).

⁷ *Id.* § 107d-3.

⁸ This is particularly true because of the creation of the retroactive right to vending income built into the Act (with the established date of accrual determined to be 1 January 1975).

The 1954 Amendments

In 1954 the Act¹⁵ was amended for the first time. As Congressman Barden indicated during the House debate:

It seems that a new gadget has come into existence. I am referring to these vending machines...[I]n many instances Federal employees or others had simply fenced out the blind people by putting in the vending machines, which took over the business of the blind stands.¹⁶

Although the motivation to reexamine the 1936 Act came from the advance of technology, the primary concern of the 1954 amendments clearly was the expansion of opportunities for the blind. This intent to increase the scope of the program resulted in three major changes to the Act.

First, the application of the program was changed from federal *buildings* to federal *property*, defined as "any building, land, or other real property owned, leased, or occupied by any department or agency of the United States".¹⁷ Legislative history indicates that this change was implemented to "allow blind people to have vending stands on Army posts, atomic centers, and other Federal projects."¹⁸ Second, the discretion of agencies to exclude the blind was limited by requiring agencies to give a *preference* to blind persons, so far as feasible, when authorizing the operation of vending stands of federal property.¹⁹ Finally, the preference to the blind was protected by requiring that each agency or department "prescribe regulations designed to assure such preference (including assignment of vending machine income to achieve and protect such preference)...without unduly inconveniencing such departments and agencies or adversely affecting the interests of the United States."²⁰ These regulations had to

be passed with the approval of the President and after consultation with the Secretary of Health, Education and Welfare (who had taken over responsibility for administration of the program).²¹

Although these amendments clearly attempted to reduce agency discretion, they conditioned the preference requirement by the phrase "so far as feasible" and the protective provisions by the condition that the agency need not be unduly inconvenienced.²² Even if these loosely worded requirements did not leave agencies with unfettered discretion, they certainly fell short of fulfilling Senator Purtell's expression of the conference committee's intent that:

the property of the Federal government should be more fully and freely utilized in expanding the vending stand program for the blind, and that no department or agency should be permitted to refuse suitable stand locations to this blind program except where such stand would clearly conflict with the proper functioning of the department or agency.²³

It is not surprising, then, that Congress' expectations for the blind vendors program did not come to fruition.

The 1974 Amendments

The rapid proliferation of automatic vending machines and the lack of enthusiasm in many federal agencies toward the promotion and expansion of the Randolph-Sheppard Act prompted state licensing agencies and national organizations representing the blind to press for modernization of the law.²⁴ In 1969 Senator Jennings Randolph began the reexamination process which included several proposed bills and several sets of hearings over a five-year

¹⁵Act of Aug. 3, 1954, Pub. L. No. 565, 68 Stat. 663 (1954) [hereinafter cited as 1954 Amendment].

¹⁶S. Rep. 937, *supra* note 10, at 6.

¹⁷1954 Amendment § 4(b).

¹⁸S. Rep. 937, *supra* note 9, at 6.

¹⁹1954 Amendment § 4(a).

²⁰*Id.*

²¹All functions of the "Office of Education" were transferred to the "Federal Security Administrator" in the 1946 Reorganization Plan No. 2, 60 Stat. 1095 (1946). They were later transferred to the Secretary of Health, Education, and Welfare in the 1953 Reorganization Plan No. 1, 67 Stat. 631 (1954).

²²1954 Amendment § 4(a).

²³S. Rep. 937, *supra* note 10, at 7.

²⁴*Id.* at 8.

period.²⁵ S.2581, which eventually passed as the 1974 Amendments,²⁶ was introduced on 13 October 1973. It was preceded by a special Comptroller General study on the financial status of vending operations on federal property²⁷ and was followed by three days of hearings by the Senate Subcommittee on the Handicapped.²⁸ The 1974 Amendments, like the original Act and the 1954 Amendments, passed without any dissenting votes.²⁹

Senator Randolph, in reporting the bill, indicated that there were widespread, major abuses of blind vendors and of the Randolph-Sheppard program.³⁰ Specific problems identified in hearings and in the Comptroller General's study, which the amendments sought to address, included:

- (1)The "singular insensitivity" of commanders of military installations to the program. Although there were over 490 active military installations, there were only 42 blind vendors on those installations.³¹
- (2)The direct competition from vending machines which could be placed in more

accessible and convenient areas than vending stands.³²

- (3)The preference of agencies for cafeteria operations rather than vending stands.³³
- (4)The reluctance of commanders to risk losing vending machine income which contributed to employee recreation and welfare activities.³⁴

Senator Randolph maintained that by removing these and other impediments, the size of the program could double in five years.³⁵

The Current Statutory and Regulatory Scheme

The 1974 Amendments, which completely revised the Randolph-Sheppard Act, comprise the current version of the statute. In an effort to remedy the problems cited above, Congress created a more extensive scheme of substantive requirements and procedural controls. The substantive provisions center around three general mandates:

- (1) Blind vendors will have *priority* on federal property;³⁶
- (2) "New Buildings" will include *satisfactory sites* for blind vendors;³⁷ and
- (3) Certain *vending machine income* will be paid to the blind.³⁸

Procedural controls impacting on the military include increased *control of the program* by the Secretary of the Health, Education and Welfare,³⁹ and creation of an *arbitration procedure* to resolve disputes.⁴⁰ The requirements of the Act have been implemented by Department of

²⁵The various bills preceding enactment of S.2581 included S.2461 (introduced on June 20, 1969 but was not passed due to adjournment of the 91st Congress); and S.2506 (introduced on Sept. 14, 1971 and later added to a larger piece of legislation, S. 3987, which in turn deleted the Randolph-Sheppard amendments). See generally S. Rep. 937, *supra* note 10, at 8-11.

²⁶Act of Dec. 7, 1974, Pub. L. No. 516, 88 Stat. 1623 (1974) [hereinafter cited as 1974 Amendments]. These amendments were the last major amendments to the current version of the Randolph-Sheppard Act and represent most of the text of the Act found at 20 U.S.C. § 107 (1976).

²⁷*Review of Vending Operations on Federally Controlled Property*, Comp. Gen. Rpt. No. B-176886 (Sept. 27, 1973) [hereinafter cited as Comp. Gen. Rept.].

²⁸Hearings were held on November 16, 19, and December 6, 1973. See 1973 Hearings, *supra* note 1.

²⁹Act of Dec. 7, 1974, Pub. L. No. 93-516, 1974 U.S. Code Cong. & Ad. News (88 Stat.) 6377.

³⁰S. Rep. 937, *supra* note 10, at 11.

³¹*Id.* at 10. See generally 1973 Hearings, *supra* note 1; Comp. Gen. Rept., *supra* note 27.

³²S. Rep. 937, *supra* note 10, at 10.

³³*Id.*

³⁴*Id.*

³⁵*Id.* at 13.

³⁶20 U.S.C. § 107(b) (1976).

³⁷*Id.* § 107a(d)(1).

³⁸*Id.* § 107-3(b)(1).

³⁹*Id.* § 107(b).

⁴⁰*Id.* § 107d-2.

Defense and Department of the Army regulatory provisions.⁴¹

Priority to Blind Vendors

In a clear statement of intent, Congress now mandates that blind vendors be given *priority* in operating vending facilities on federal property.⁴² This can be contrasted with the mere "authorization to operate" in the original Act, and the "preference" in the 1954 Amendments. The express standard requires that, whenever feasible, one or more vending facilities should be established on a federal property unless that would adversely affect the interests of the United States.⁴³ While this provision still contains language susceptible to "loophole interpretation," those loopholes have been closed by taking the discretion away from the agency in determinations of "feasibility" and "adverse affect."⁴⁴

It should also be noted that a distinction exists between vending facilities, which are very broadly defined to include automatic vending machines, cafeterias, snack bars, and counter service operations;⁴⁵ vending machines, which are coin or currency machines designed to dispense articles or services (except amusement machines or telephones);⁴⁶ and food dispensing facilities, which engage primarily in full table-service operations.⁴⁷ The priority provision applies to vending facilities which automatically includes vending machines, vending stands, and cafeterias. Although all three operations are contained in the same single statutory provision, the DOD Directive and Army Regulation treat vending machines and stands differently from cafeteria operations. For vending facilities, except cafeterias, the burden of seeking out opportunities and applying for a

permit falls upon the state licensing agency.⁴⁸ The installation has no affirmative obligation until a permit application is submitted. Once a permit request is submitted, the priority provision takes effect unless the interests of the United States would be adversely affected. When a cafeteria operation is involved, solicitations must be prepared by the procuring activity with a copy sent to the state licensing agency for the blind. If the state licensing agency submits a proposal within the competitive range, it will be awarded the contract unless such award would adversely affect the interests of the government, or the blind vendor does not have the capacity to provide service at comparable cost and of comparable high quality as other competitors.⁴⁹

Although the regulatory implementation of the priority provision certainly is within the letter of the statutory requirement, both fall short of manifesting the legislative intent regarding priority. Senate Report No. 937 describes Congress's intent as follows:

The committee wishes to state as its firm intention that the law, as now written, and as projected under S.2851, is directed toward the establishment and protection of blind vending operations. The insertion of the term "priority" underscores the Committee's expectation that where a vending facility is established on Federal property, it is the *obligation of the agency . . . to assure that one or more blind vendors have a prior right to do business . . . and furthermore that, to the extent that a minority business enterprise or non-blind operated vending machine competes with or otherwise economically injures a blind vendor, every effort must be made to eliminate such competition or injury. Where no vending facility has been introduced to a*

⁴¹See *supra* note 3.

⁴²20 U.S.C. § 107(b)(1976).

⁴³*Id.*

⁴⁴*Id.* § 107.

⁴⁵*Id.* § 107e(7).

⁴⁶32 C.F.R. § 260.6(p) (1981).

⁴⁷*Id.* § 260.6(q).

⁴⁸DOD Dir. 1125.3, Encl. 2 para. 2; AR 210-25, para. 5a. Both provisions provide that "primary responsibility for carrying out this intent falls upon the State licensing agency." A listing of state licensing agencies is contained in Appendix B to AR 210-25.

⁴⁹DOD Dir. 1125.3, Encl. 2, para. 2(c); AR 210-25, para. 5a(3).

Federal building, one or more blind vendors shall, to the maximum extent feasible, be placed in such building.⁵⁰

Arguably the drafters envisioned a more aggressive approach for federal agencies in the facilitation and promotion of blind vending operations.

Satisfactory Sites

All federal buildings acquired, substantially altered, or renovated after 1 January 1975 are required to include satisfactory sites for blind vending facilities unless they would be in direct competition with an already existing food facility in a non-federal portion of the same building, or unless the Secretary of HEW and the state licensing agency determine that the number of people using the building is insufficient to support a vending facility.⁵¹ This provision includes rentals, leases, or any other new occupation of a building or portion of a building.⁵² "Renovation" is also broadly defined to include any substantial alternation affecting available floor area.⁵³

Regulatory implementation exempts buildings occupied by less than 100 federal employees during normal working hours and buildings will less than 15,000 square feet for use by the general public.⁵⁴ These exemptions, based upon a determination by the Secretary of HEW that this criteria defines which buildings can support a vending facility,⁵⁵ represent an area of potential litigation.

The clear language on the face of the statute indicates that the satisfactory site requirement does not apply "when the Secretary and the State licensing agency determine that the

number of people using the property is or will be insufficient to support a vending facility."⁵⁶ This does not seem to contemplate a unilateral decision by the Secretary applicable to all the states, although the legislative history does suggest that the Secretary may want to establish criteria such as these to ease the administrative burden in implementing the Act.⁵⁷

The problem is further compounded by the fact that the "100 federal employee" standard only includes civilian employees.⁵⁸ Thus, a new building housing 90 civilian and 4000 military employees would automatically be exempt from the satisfactory site requirement because of this regulatory presumption that there are insufficient people to support a vending facility. This result defies logic as well as the clear intent of the Act to enlarge the blind vendor program. In such a situation, the more prudent approach would be to provide a satisfactory site.

Vending Machine Income

In order to keep the dramatic increase in the use of vending machines from driving blind vendors out of business, or making the establishment of a blind vending stand economically unattractive, certain vending machine income is assigned to the blind. If vending machines are in "direct competition" with a blind vending facility (defined as machines on the same premises and which serve workers who have access to the blind vending facility), the blind vendor gets 100% of the income from the machines.⁵⁹ "Income" is generally the profit from agency-owned machines, or the commission from commercially-owned machines.⁶⁰ Even if there is no blind vendor on the federal property, and no direct competition, 50% of all vending machine income goes to the state licensing agency⁶¹ unless the annual income from the

⁵⁰S. Rep. 937, *supra* note 10, at 15 [emphasis added].

⁵¹20 U.S.C. § 107a(d)(1) (1976). "Satisfactory site" generally means an area with sufficient space, electrical, and plumbing outlets for the operation of a vending facility (although this definition is susceptible to expansion by regulatory provisions and by negotiations between the government agency and the state licensing agency).

⁵²*Id.*

⁵³32 C.F.R. § 260.6(o) (1981).

⁵⁴*Id.* § 260.3(h)(2).

⁵⁵*Id.*

⁵⁶20 U.S.C. § 107a(d)(1) (1976) [emphasis added].

⁵⁷S. Rep. 937, *supra* note 10, at 19.

⁵⁸32 C.F.R. § 260.6(g) (1981).

⁵⁹20 U.S.C. § 107d-3(b)(1) (1976).

⁶⁰32 C.F.R. § 260.6(r) (1981).

⁶¹20 U.S.C. § 107d-3(b)(1) (1976).

machines at the installation or location is less than \$3000.⁶²

This \$3000 income exception leads to some illogical results. If the agency-owned machines at a "location" (defined as a building or self-contained group of buildings) earn \$2500 in income, the agency keeps all the money. If the machines earn \$4000, 50% (\$2000) goes to the state licensing agency for the blind, and the agency keeps only \$2000. Economically, the agency maximizes its earnings by keeping its annual income at \$3000 unless it can generate income greater than \$6000. If normal earnings would fall between \$3000 and \$6000, it is in the agency's best interest to reduce the price of merchandise (thus providing a collateral benefit to its employees) and limit income to \$3000 (thus maximizing profit).

The one exception to these revenue sharing provisions is for "income from vending machines *within retail sales outlets* under the control of exchange or ships' stores systems."⁶³ This provision was apparently designed to allow the military to retain its primary source of income for military recreation and welfare programs. The problem arises from the difference in the apparently restrictive language of the statute "within retail sales outlets" as compared to the broader regulatory exception which exempts all "income from vending machines *operated by or for the military exchange or ships' stores systems.*"⁶⁴ On installations where the exchange owns machines located at various vending locations around post (at gas stations, theaters, bowling alleys, barracks, etc.) this distinction could involve a substantial amount of money.

The Senate Report seems to favor the broader language. In explaining the purpose of the provision it states, "military exchange systems operate under specific statutory authority, and are thus, as a matter of policy, excluded."⁶⁵ If

this indeed is the reason for the statutory exception, it would apply with equal weight to any machines owned or operated by the exchange system regardless of where they are located. The opposite side of the argument is that Congress did not intend to allow blind vendors to be driven from the federal property by the exchange system's monopolization of all vending machines. At least two states, Texas and Oklahoma, disagree with the military's broad reading of the exception.⁶⁶

In *State ex rel Dept of Human Services v. Weinberger*,⁶⁷ the district court adopted the regulatory language, based upon the legislative history, and granted the government a summary judgment. In arriving at its decision, the court first concluded that the statute was unclear because the plain language had in fact been interpreted differently by two government agencies (HEW⁶⁸ and DOD), HEW had internally been inconsistent in its interpretations, and because the language conflicted with the purpose of the statute. When an ambiguity exists, deference would ordinarily be paid to the interpretation given by the agency charged with supervision of the Act, i.e., HEW. This deference was not accorded in this case because HEW's interpretation conflicted with clear legislative intent. The most persuasive evidence of intent was a colloquy between Congressmen Brademas and Sikes during a house floor debate in which Congressman Brademas, the chairman of the proponent subcommittee, was asked whether the provision "exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges." The answer received was "Yes."⁶⁹ This decision was upheld by the 10th Circuit Court of Appeals.⁷⁰

⁶²The state of Texas sent the issue to arbitration pursuant to 20 U.S.C. § 107d-1(b) (1976).

⁶⁷No. 81-928-T (W.D. Okla. Dec. 22, 1982).

⁶⁸Regulations promulgated by the Secretary of Health, Education, and Welfare had adopted the same wording as the statute in 45 C.F.R. § 1369.32(i) (1976).

⁶⁹Cong. Rec. H10604 (daily ed. Oct. 16, 1974).

⁷⁰Army Times, Nov. 21, 1983, at 49, col. 1.

⁷¹*Id.*

⁶²*Id.* § 107d(3)(d).

⁶³*Id.* [emphasis added].

⁶⁴32 C.F.R. § 260.3(i)(3)(i); DOD Dir. 1125.3, Encl. 2, para. 5(c)(1); AR 210-25, para. 5e(3)(a) [emphasis added].

⁶⁵S. Rep. 937, *supra* note 9, at 24.

The same issue has also been raised by the State of Texas. An arbitration panel decided in favor of the state, limiting the military exchange exemption to vending machines physically located in retail outlets. This arbitration has been challenged in the U.S. Court of Claims.⁷¹

Control of the Program

Where the original Act and the 1954 Amendments granted a great deal of discretion to agency heads in determining how the program would operate, currently almost all such authority is vested in the Secretary of Education.⁷² In addition to the duty of prescribing regulations for the other agencies,⁷³ only the Secretary can make the determination that granting a priority to blind vendors would adversely affect the interests of the United States. This determination is made based on a written justification prepared by the agency and must be published in the Federal Register.⁷⁴ Although this authority effectively allows the Secretary to stop other federal agencies from taking action adverse to the interests of the program, it does not allow the Secretary to impose affirmative "goals" or "quotas."

Arbitration

To add enforcement power to the statute, Congress created a grievance system which allows a dissatisfied blind vendor to request a full evidentiary hearing before the state licensing agency.⁷⁵ If the dispute is still unresolved, the state licensing agency or the dissatisfied blind vendor can file a complaint to the Secretary who will refer the matter to an ad hoc arbitration

panel, which has the power to issue a final and binding decision.⁷⁶

Conclusion

Although this article has not mentioned many of the procedural and technical aspects of the Randolph-Sheppard Act, the major principles alone demonstrate that the Act has diverse applications and a significant potential to produce litigation.

The fact that the issues it may raise do not fit neatly within any particular contract law or administrative law subject area has resulted in a lack of publicity and a lack of appreciation. This does not mean that the Randolph-Sheppard Act is unimportant. Every military installation in the United States can be, and probably is, directly affected by the "priority," "satisfactory site," and "vending machine income" provisions of the Act. It follows then that every judge advocate must be competent to perform the role of issue identification regarding these matters.

⁷²The functions of the Secretary of Health, Education and Welfare were transferred to the Secretary of Education in 93 Stat. 696 (1979). The language of the Act itself still refers to the Secretary of HEW as the administrator of the program.

⁷³20 U.S.C. § 107(b) (1976). The 1984 Amendment allowed the agencies to make their own regulations after consultation with the Secretary of HEW. 1954 Amendment § 4(a).

⁷⁴20 U.S.C. § 107 (1976).

⁷⁵*Id.* § 107d-1(a).

⁷⁶*Id.* § 107d-1(b).

The Military's Rape Shield Rule: An Emerging Roadmap

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Introduction

Military Rule of Evidence 412,¹ the new "rape shield" rule, sharply limits defense counsel's use of evidence concerning a sexual assault victim's² own sexual behavior. Reputation and opinion evidence are totally prohibited,³ and evidence of specific instances of past sexual behavior is admissible only in a few restricted situations.⁴ These limitations, although calcu-

lated to promote a number of legitimate government interests,⁵ raise troubling constitutional questions. A literal application of M.R.E. 412 may, in certain factual contexts, prevent admission of crucial defense evidence and thus encroach on a defendant's fifth amendment right to due process⁶ and sixth amendment right to confrontation and compulsory process.⁷

This clash between constitutional protections and rape shield provisions has generated much controversy.⁸ Courts and commentators have labored at length to map out a workable boundary line between the two shields—to uphold

¹The Military Rules of Evidence, Manual for Courts-Martial, United States, 1969 (Rev. ed.) chapter XXVII [hereinafter cited as M.R.E.] became effective on 1 September 1980. Only recently have the first M.R.E. cases worked their way through the review process to the Court of Military Appeals. See *infra* text accompanying note 9.

²The term "rape shield" is somewhat of a misnomer since M.R.E. 412, unlike Federal Rule of Evidence 412 [hereinafter cited as F.R.E. 412], applies to all nonconsensual sexual offenses, including rape, forcible sodomy, and indecent assault (F.R.E. 412 applies only to rape and assault with intent to commit rape). As used in this article, the term "victim" refers to a person who has been subjected to any nonconsensual sexual offense.

³M.R.E. 412(a) provides:

Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

⁴M.R.E. 412(b) provides in part:

Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence... is—

(1)...constitutionally required to be admitted; or
(2)...(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen

or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

⁵See *infra* notes 19-22 and accompanying text.

⁶"No person shall be...deprived of life, liberty, or property, without due process of law..." U.S. Const. amend. V. The right to due process includes the right of a criminal defendant to a fair opportunity to present exculpatory evidence. *Chambers v. Mississippi*, 410 U.S. 284 (1973). See *infra* discussion accompanying notes 43-46.

⁷"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..." U.S. Const. amend. VI. An accused should have a meaningful opportunity to present the defense's case through witnesses. See Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974) [hereinafter cited as Westen]. The right to confrontation includes the right to cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). See *infra* discussion accompanying notes 39-42.

⁸See generally Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980) [hereinafter cited as Tanford & Bocchino]; and Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 Wm. & Mary L. Rev. 1 (1976) [hereinafter cited as Rudstein].

the legislative goal of protecting the privacy of rape victims yet still preserve a defendant's right to a fair trial. In recent months, the Court of Military Appeals has joined this effort at legal cartography by issuing a series of opinions explicating the military version of the rape shield rule.⁹ These opinions not only sketch out an analytical framework¹⁰ for resolving M.R.E. 412 issues, but also provide a number of practical hints for both counsel and judges.¹¹ In order to understand the approach taken by the Court of Military Appeals, however, it is first helpful to know M.R.E. 412's historical and legislative roots, as well as its constitutional dimensions.

Historical Background

Before the advent of rape shield laws, defense counsel could usually conduct a wide-ranging and often humiliating inquiry into the victim's sexual background.¹² Prior to M.R.E. 412, the Manual for Courts-Martial followed this traditional approach, allowing "any evidence, otherwise competent, tending to show the unchaste character of the alleged victim,"¹³ even if the victim chose not to testify. This practice reflected a deep-rooted assumption that so-called "chastity evidence" related both to a victim's general credibility as a witness and to the likelihood of consent to the particular act in

question.¹⁴ Recently, many commentators have disputed this assumption, arguing that the traditional free-wheeling approach to prosecutions of sexual offenses not only produced irrelevant and inflammatory evidence but also discouraged victims from reporting offenses.¹⁵

In response to mounting criticism, most states amended their rules of evidence during the last decade to curtail the traditional inquiry into a victim's sexual background.¹⁶ The federal government followed suit; Congress passed the Privacy Protection for Rape Victims Act of 1978,¹⁷ now incorporated as Federal Rule of Evidence 412 (F.R.E. 412). This new rule served as the model for M.R.E. 412.¹⁸

The legislative history of F.R.E. 412 suggests that Congress enacted the rule primarily "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives."¹⁹ From a law enforcement standpoint, such protection has the salutary effect of encouraging victims to report rape

⁹See *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983); *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983); *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983); *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983).

¹⁰See *infra* text accompanying notes 51-55.

¹¹See *infra* text accompanying notes 101-106.

¹²See generally Tanford & Bocchino, *supra* note 8, at 546-51.

¹³Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 153b(2)(b).

"Trying the victim" was permitted, if not encouraged, by 153b(2)(b) of the *Manual*. It allowed defense counsel to present opinion and reputation evidence dealing with every facet of the victim's past sexual behavior, from associations to specific instances of illicit sexual intercourse. The only codified limitation here was the *Manual's* prohibition against remote evidence.

S. Saltzberg, L. Schinasi, & D. Schleuter, *Military Rules of Evidence* 205 (1981) [hereinafter cited as Saltzberg].

¹⁴See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 15-19 (1977) [hereinafter cited as Berger]; Ordovery, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 Cornell L. Rev. 90, 96-102 (1977).

¹⁵See generally the list of sources cited in Tanford & Bocchino, *supra* note 8, at 549 n.22.

¹⁶*Id.* at 544. Presently, forty-eight states have enacted rape shield statutes of one form or another. Note, *The Constitutionality of North Carolina's Rape Shield Law*, 17 Wake Forest L. Rev. 781, 782 (1981) [hereinafter cited as Carolina Note].

¹⁷Pub. L. No. 95-540, 92 Stat. 2046 (1978).

¹⁸Saltzberg, *supra* note 13, at 205-06.

¹⁹124 Cong. Rec. H11945 (daily ed. Oct. 10, 1978) (remarks of Rep. Holtzman) [hereinafter cited as Congressional Record].

offenses.²⁰ Another government interest justifying F.R.E. 412 is the notion that evidence of a victim's sexual background is so inherently distracting and inflammatory that a jury exposed to such evidence will tend to try the character of the victim rather than assess the guilt of the accused.²¹ In short, both F.R.E. 412 and its military counterpart, M.R.E. 412, advance a number of legitimate privacy,²² law enforcement, and courtroom interests.

Almost without exception, state rape shield statutes have survived federal constitutional challenges in state courts.²³ Similarly, each of the handful²⁴ of federal cases dealing with F.R.E. 412 has upheld its validity,²⁵ although in

one instance a bit of judicial legerdemain was necessary.²⁶ Thus far, the Supreme Court has declined every opportunity to review state rape shield statutes.²⁷ In one noteworthy case, the Court refused "for want of a substantial federal question" to hear a constitutional attack on a state statute identical to F.R.E. 412.²⁸

The Federal Rule's "Saving Clause"

F.R.E. 412 began life with a difficult birth. As originally drafted, the rule would have allowed chastity evidence in only two limited circumstances: to dispute the prosecution's

²⁰Berger, *supra* note 14, at 5.

Too often in this country victims of rape are humiliated and harrassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.

Congressional Record, *supra* note 19, at H11945 (remarks by Rep. Holtzman).

²¹Tanford & Bocchino, *supra* note 8, at 569.

²²A victim's right to privacy, although an important factor in the recent trend favoring rape shield statutes, does not rise to the level of a constitutional concern. Tanford & Bocchino, *supra* note 8, at 565; Berger, *supra* note 14, at 40; but cf. Carolina Note, *supra* note 16, at 790.

²³See Annot., *Constitutionality of "Rape Shield" Statutes Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. 4th 283 (1980); see also Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982) (upholding constitutionality of Tennessee rape shield statute similar to F.R.E. 412).

²⁴Rape prosecutions are a tiny fraction of the federal trial caseload—only 42 cases in the three-year period from 1974 through 1976. Accordingly, federal courts have scant opportunity to interpret the provisions of F.R.E. 412. S. Saltzberg & K. Redden, *Federal Rules of Evidence Manual* 226 (3d ed. 1982) [hereinafter cited as Redden].

²⁵United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (trial court did not abuse its discretion in prohibiting cross-examination of victim on her marital status since evidence would have brought to the jury's attention that victim had an illegitimate son, and probative value of evidence was substantially outweighed by danger of prejudice); Doe v. United States, 666 F.2d 43 (4th Cir. 1981) (evidence of con-

versations defendant had with victim and with other men about victim's prior sexual history admissible to show defendant's mental state and intent); United States v. Nez, 661 F.2d 1203 (10th Cir. 1981) (evidence of prosecutrix's past sexual behavior properly excluded where defense waited until appeal to characterize evidence as relevant to prosecutrix's motive in bringing rape charge); Virgin Islands v. Scuito, 623 F.2d 869 (3d Cir. 1980) (under "spirit of Rule 412," no abuse of discretion by trial judge in denying defense motion for expert opinion of rape victim's mental state); cf. Hughes v. Raines, 641 F.2d 791 (9th Cir. 1981) (F.R.E. 412 favorably mentioned in dictum).

²⁶Doe v. United States, 666 F.2d 43 (4th Cir. 1981). The court held inadmissible, pursuant to F.R.E. 412(a)'s ban on reputation and opinion evidence, the prospective testimony of four witnesses concerning a rape victim's reputation for promiscuous behavior. The court did allow similar evidence, however, to show defendant's state of mind at the time of the alleged rape based on what he knew of her reputation through prior conversations with other men and from reading a love letter written by the victim to another man. While reserving decision on the general question of whether reputation or opinion evidence might in extraordinary situations be justified to preserve an accused's constitutional rights, the court held that F.R.E. 412 did not exclude such evidence if offered solely to show the accused's state of mind. See Spector & Foster, *Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock*, 35 Okla. L. Rev. 87 (1982) [hereinafter cited as Spector & Foster].

²⁷State v. Cosden, 18 Wash. App. 213, 568 P.2d 802 (1977), cert. denied, 439 U.S. 823 (1978); People v. Mandel, N.Y.S.2d 63 (1978), rev'd 401 N.E.2d 185 (1979), cert. denied, 446 U.S. 949 (1980); State v. Hill, 309 Minn. 206, 244 N.W.2d 728, cert. denied, 429 U.S. 1065 (1976).

Not since *Giles v. Maryland*, 386 U.S. 66 (1967), has the Supreme Court reviewed the exclusion of chastity evidence. In *Giles*, the Court reversed a rape conviction based on the prosecutor's nondisclosure of the victim's history of promiscuity. Although the case pivoted on the issue of prosecutorial misconduct, the Court did not question the relevance of the chastity evidence.

²⁸Goode v. Ohio, 450 U.S. 903 (1981) (mem.).

physical evidence concerning source of any semen or injury; and to show past sexual activity between defendant and victim. The narrow scope of these exceptions produced considerable controversy.²⁹ During House of Representatives hearings on the proposed rule, representatives of the Department of Justice and the American Civil Liberties Union pointed out several other situations in which a defendant would legitimately need to present chastity evidence.³⁰ In response, the drafters inserted a "saving clause" into the proposed federal rule to permit introduction of specific instances of the victim's past sexual behavior when "constitutionally required."³¹ In the words of one drafter, this provision is "intended to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right."³²

The drafters of the Military Rules of Evidence adopted this saving clause verbatim, although they expressed some concern about categorically excluding reputation or opinion evidence. The official analysis of M.R.E. 412 exudes caution:

[I]t is the committee's intent that the Rule not be interpreted as a rule of absolute privilege. Evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a). It is unclear whether reputation or opinion evidence in this area will rise to a level of constitutional magnitude,

and great care should be taken with respect to such evidence.³³

These cautionary lines, couched partly as intention and partly as commentary, are a clever finesse. Without disrupting the general thrust of the rule, they pave the way for judicial loosening of M.R.E. 412(a)'s absolute ban on reputation and opinion evidence, and the Court of Military Appeals has given its approval to a broader reading of the saving clause. In *United States v. Hollimon*,³⁴ the court concluded that whatever type of evidence may be offered as to the sexual history of an alleged victim, if the Constitution requires its admission it will be admitted despite the purported absolute bar contained in M.R.E. 412(a).³⁵ The court, although finding that the reputation evidence in question was not admissible, proposed a scenario in which admission of reputation evidence may be constitutionally required.³⁶

Thus, the saving clause in M.R.E. 412(b), which permits introduction of evidence that is "constitutionally required to be admitted," necessarily extends to M.R.E. 412(a) as well. As one commentator notes, however, it is axiomatic that even without an express saving clause, no provision of M.R.E. 412 can take precedence over the Constitution.³⁷ The problem becomes one of identification: what is meant by the term "constitutionally required," i.e., what fact patterns come within the ambit of this saving clause? In order to answer this question, it will be useful to first determine what constitutional rights are affected by M.R.E. 412's restrictions on chastity evidence.

²⁹See *Proposed Privacy Protection for Rape Victims Act of 1976: Hearings on H.R. 14666 and Other Bills before the Criminal Justice Subcomm. of the House Judiciary Comm.*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Hearings*].

³⁰*Id.* at 5 (testimony of Roger Pauley, Department of Justice), 64, and 69-70 (testimony of Dovey Roundtree, American Civil Liberties Union).

³¹F.R.E. 412(b)(1). The corresponding M.R.E. contains identical language.

³²Congressional Record, *supra* note 19, at H11944 (remarks of Rep. Mann).

³³Analysis to Military Rule of Evidence 412, reprinted in *Manual for Courts-Martial, United States*, 1969 (Rev. ed.) app. 18 at 65 (C.3, 1 Sept. 1980) [hereinafter cited as *Analysis*].

³⁴16 M.J. 164 (C.M.A. 1983).

³⁵*Id.* at 165-66. See also *United States v. Elvine*, 16 M.J. 14, 18 (C.M.A. 1983) (in dicta, the court expressed its doubts whether M.R.E. 412(a) could properly bar the introduction of all reputation evidence).

³⁶*Hollimon*, 16 M.J. at 166.

³⁷Saltzberg, *supra* note 13, at 224.

Constitutional Issues

Many commentators believe that rape shield rules such as F.R.E. 412 and its military cousin, M.R.E. 412, infringe on a defendant's sixth amendment right of confrontation and compulsory process and the fifth amendment right to due process.³⁸ Although the Supreme Court has not yet addressed this specific issue, three precedents provide a starting point for analysis.

In *Davis v. Alaska*,³⁹ the Court held that a juvenile shield statute had to yield to the defendant's right to cross-examine an adverse witness for possible bias.⁴⁰ The statute in question prevented the defense from inquiring into a witness' background as a juvenile offender, much as rape shield statutes foreclose defense foraging into certain aspects of a victim's sexual past. In *Davis*, the prosecution had built its case around the testimony of the juvenile. Similarly, in many cases involving sexual offenses, the prosecution's prime witness is the prosecutrix herself. In *Davis*, after noting that "[t]he accuracy and truthfulness of [the juvenile's] testimony were key elements in the State's case against the petitioner,"⁴¹ the Court concluded that:

Whatever temporary embarrassment might result to [the juvenile] or his family by disclosure of his record... is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness.... The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.⁴²

³⁸Berger, *supra* note 14, at 39; Rudstein, *supra* note 8, at 19; Tanford & Bocchino, *supra* note 8, at 580-81, 589.

³⁹415 U.S. 308 (1974).

⁴⁰*Id.* at 320.

⁴¹*Id.* at 317.

⁴²*Id.* at 320. *Davis* did not hold that the statute was per se unconstitutional. Rather, the Court ruled that because the crucial prosecution witness in the case was a juvenile offender, the state juvenile shield statute denied *Davis* the chance to show the juvenile's bias, thus making the statute invalid as applied.

In *Chambers v. Mississippi*,⁴³ the Supreme Court held that the exclusion of critical defense evidence at a murder trial, resulting from the application of state rules of evidence, denied the accused his due process right to a fair hearing.⁴⁴ Noting that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,"⁴⁵ the Court concluded that evidentiary rules may not be applied mechanically to prevent a defendant from exculpating himself.⁴⁶

In *Washington v. Texas*,⁴⁷ the Supreme Court expanded the application of the sixth amendment by broadly framing the scope of the compulsory process clause. Compulsory process was determined to reach beyond the mere production of witnesses and include the right to have them heard:⁴⁸ [t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.⁴⁹ Applying this rationale to the facts in *Washington*, the Court invalidated a Texas statute that prohibited an accomplice from testifying for the defense. Because the statute "arbitrarily" disqualified the relevant and material testimony of an entire class of witnesses, *Washington* was denied the right to present a defense.⁵⁰

⁴³410 U.S. 284 (1973).

⁴⁴*Chambers*, charged with murder, attempted to show at trial that another person, McDonald, was the culprit. McDonald had confessed the murder to *Chambers*' attorneys as well as to friends. When called as a defense witness at trial, however, McDonald repudiated his confessions. Due to Mississippi's "voucher" rule, which prohibited a party from impeaching one's own witness, the defense could not attack McDonald's credibility; because the state did not recognize a hearsay exception for declarations against penal interest, the defense could not introduce evidence of the out-of-court confessions McDonald allegedly made to his friends.

⁴⁵410 U.S. at 303.

⁴⁶*Id.* at 302.

⁴⁷388 U.S. 14 (1967).

⁴⁸*Id.* at 23.

⁴⁹*Id.*

⁵⁰See generally Westen, *supra* note 7, at 111-117.

Framework for Analysis

With these cases as precedent, the Court of Military Appeals addressed the meaning of the phrase "constitutionally required to be admitted" in three cases decided in July 1983.⁵¹ The court focused on an accused's constitutional right to present a defense as the proper basis for the evidentiary rule. The court adopted Professor Peter Westen's theory⁵² that the confrontation and compulsory process clauses of the sixth amendment together provide a constitutional basis for this right. Therefore, at least in regard to the admissibility of past sexual behavior under M.R.E. 412(b)(1), the court held that it is the sixth amendment right to present a defense which is the basis for the exception.⁵³ Citing a Supreme Court compulsory process case, *United States v. Valenzuela-Bernal*,⁵⁴ the court adopted a basic test for resolving M.R.E. 412 issues: before evidence of a sexual assault victim's past sexual behavior can be admitted, the defense must demonstrate that the proffered evidence is relevant, material, and favorable to its case.⁵⁵

The court applied this test in *United States v. Dorsey*⁵⁶ to determine whether excluded evidence of an alleged rape victim's prior sexual conduct was constitutionally required to be admitted. *Dorsey* involved an Army private convicted of rape who unsuccessfully tried to introduce evidence concerning a possible motive for the prosecutrix to lie about the charge. The defense theory of the case was that the victim offered herself sexually to the accused, who rejected her advances and

rebuked her for already having engaged in sexual intercourse with the accused's roommate a few hours before. This reproof, according to the defense, generated feelings of anger and guilt which then led the prosecutrix to file a false charge of rape in revenge. The trial judge, although permitting the accused to testify about this purported chain of events, barred introduction of any extrinsic evidence concerning the earlier act of sexual intercourse between the prosecutrix and the accused's roommate.

In applying the sixth amendment test to the facts in *Dorsey*, the court began its analysis with a discussion of relevance: "[t]he first question we must decide is whether appellant demonstrated the relevance of the proffered evidence to prove the existence of a fact asserted by the defense."⁵⁷ In determining whether such evidence was relevant, the court fashioned a standard to meet the constitutional requirements of the sixth amendment. It concluded that the prevailing standard of relevance found in M.R.E. 401 was sufficient:⁵⁸ does the evidence have "any tendency to make the existence of any fact— . . . more probable or less probable than it would be without the evidence?"⁵⁹ Applying this standard, the court found the victim's act of sexual intercourse with Dorsey's roommate relevant to show her guilty feelings and thus a motive to cry rape.⁶⁰

The court then addressed the second requirement of the test: "whether the defense demonstrated that the excluded evidence was

⁵¹*United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983); *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983); *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983).

⁵²Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

⁵³*Dorsey*, 16 M.J. at 5.

⁵⁴102 S.Ct. 3440 (1982).

⁵⁵*Dorsey*, 16 M.J. at 5; *Elvine* 16 M.J. at 19; *Colon-Angueira*, 16 M.J. at 24. See generally Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191 (1975) [hereinafter cited as Westen II].

⁵⁶16 M.J. 1 (1983).

⁵⁷*Id.* at 5.

⁵⁸*Id.* See Westen II, *supra* note 55, at 205-213.

⁵⁹M.R.E. 401.

⁶⁰*United States v. Dorsey*, 15 M.J. at 5-6. Perhaps more important than the court's finding of relevance in *Dorsey* is how the majority reached that result. Judge Fletcher, writing the opinion of the court, based his theory of relevance on an intricate series of evidentiary inferences that Judge Cook called "utter nonsense" and a "tortious process" in his dissent in *Colon-Angueira*. Counsel should keep in mind that at least two members of the court are willing to follow a complicated theory of relevance based on a loose chain of inferences and speculation. Such a liberal approach to relevance certainly opens the door to broader admissibility of chastity evidence.

material."⁶¹ Does the evidence have any material bearing on the outcome of the case? Although the Military Rules of Evidence eliminate any direct reference to "materiality," the concept survives in M.R.E. 401's requirement that evidence is not relevant unless it involves a fact "which is of consequence to the determination of the action."⁶² In *Dorsey*, the court expanded this requirement for materiality into three separate inquiries: the importance of the issue in dispute vis-a-vis other issues in the case; the extent to which the issue is in dispute; and the amount of other evidence bearing on the issue.⁶³

The first factor, the relative importance of the issue, harkens back to the Supreme Court's focus in *Chambers* and *Davis* on the "critical" nature of the excluded evidence. In *Dorsey*, as in the vast number of rape cases where the participants themselves are the only eyewitnesses to the alleged offense, the "critical issue... was the credibility of the prosecutrix and appellant."⁶⁴ As might be expected, this central issue was vigorously contested, thereby satisfying the second requirement for materiality. Finally, the third condition for materiality was met due to the paucity of other evidence bearing on the defense's theory concerning the prosecutrix's feelings of guilt.

With similar ease, the court disposed of the third prong of the sixth amendment test: whether the evidence in dispute would have been favorable to the accused. The court found the excluded evidence to be exculpatory (undermined the credibility of the sole prosecution witness), corroborative, and thus favorable to the defense.⁶⁵

⁶¹*Id.* at 6. See generally *Westen II*, *supra* note 55, at 213-231.

⁶²M.R.E. 401. See *Analysis*, *supra*, note 33, at 59.

⁶³*Dorsey*, 16 M.J. at 6.

⁶⁴*Id.* at 7.

⁶⁵*Id.* This criterion, which made some sense in the *Valenzuela-Bernal* fact pattern where the government had deported illegal aliens before an accused could interview them, generally has little bearing on the typical prosecution involving rape shield issues. The dilemma in *Valenzuela-Bernal* was how to characterize evidence that had been lost

The court addressed one final question that remained a potential obstacle to the admissibility of the evidence in *Dorsey*, "whether the proffered evidence was properly excluded because its probative value did not outweigh the danger of unfair prejudice which would result from its admission."⁶⁶ This hurdle, stemming from M.R.E. 412(c)(3), places an additional requirement for legal as well as logical relevance on the proponent of past sexual behavior evidence.⁶⁷ After first noting that the balancing test set forth in M.R.E. 412(c)(3) may not even apply to evidence that is constitutionally required,⁶⁸ the court proceeded *arguendo* to apply this additional test to the fact pattern in *Dorsey*. The court concluded that evidence which meets the three-step test of *Valenzuela-Bernal* is admissible despite the language of M.R.E. 412(c)(3).⁶⁹ It is not clear, however, whether the opinion held that such evidence satisfied or overrode the requirement of M.R.E. 412(c)(3). Also unclear was whether the balancing test of M.R.E. 412(c)(3) survived as an independent basis for gauging the admissibility of chastity evidence, or whether it has now been subsumed into the test of *Valenzuela-Bernal*.

In summary, the Court of Military Appeals has developed a three-step test for determining the admissibility of chastity evidence. Before

by government action, rather than how to deal with a known quantum of potentially inflammatory evidence as in rape shield situations. Accordingly, this third prong of the test should rarely prove to be an obstacle to the defense. *But see* *United States v. Elvine*, 16 M.J. at 19.

⁶⁶*Dorsey*, 16 M.J. at 7.

⁶⁷*Id.* at 7-8. Logical relevance concerns only whether or not an item of evidence tends to prove a fact or issue in dispute. Although logical relevance is a necessary prerequisite for admissibility, the courts generally impose an additional requirement of legal relevance, i.e., that an item's probative value outweighs various dangers of prejudice, distraction, surprise, and undue expenditure of time. See generally *E. Imwinkelried, P. Gianelli, F. Gilligan, & F. Lederer, Criminal Evidence* 60-61 (1979). M.R.E. 412(c)(3) specifically incorporates this requirement for legal relevance into the test for admissibility of a victim's prior sexual history.

⁶⁸Several commentators have supported this position. See *D. Louisell & C. Mueller, Federal Evidence* § 198[B], at 183 (Supp. 1981); *Spector & Foster*, *supra* note 26, at 103-04.

⁶⁹*Dorsey*, 16 M.J. at 8.

such evidence can be admitted, the defense must demonstrate that the proffered evidence is relevant, material, and favorable to its case. This test is based upon an accused's sixth amendment right to present a defense. In practice, this new analytical framework should permit the defense to introduce considerably more chastity evidence than has been possible under the literal language of M.R.E. 412.⁷⁰ Counsel should not, however, consider the admissibility of chastity evidence a foregone conclusion. In both *United States v. Elvine*,⁷¹ and *United States v. Hollimon*,⁷² the court rejected the defense theories of relevance as inadequate. Thus, although the court seems to have relaxed the narrow standards of M.R.E. 412, it has not reopened the floodgates to chastity evidence.⁷³

Patterns of Admissibility

In addition to mapping out a general test for rape shield issues, the recent M.R.E. 412 opinions also suggest that certain types of chastity evidence are more likely to meet the new standard. Judging from the cases thus far, defense counsel will find it extremely difficult, if not

impossible, to introduce evidence of habit,⁷⁴ whereas evidence concerning state of mind, especially evidence of bias or motive,⁷⁵ should generally qualify as constitutionally required. This variable spectrum of admissibility deserves a closer look.

Habit

Commentators have suggested that evidence of a victim's prior sexual activity, if manifesting a specific, repeated pattern of behavior, may be probative of consent on a later occasion.⁷⁶ The scenario most often cited is that of a promiscuous victim who indiscriminately engages in sexual relations.⁷⁷ There are two obstacles to admitting this type of (un)chastity evidence. First, with respect to an area as psychologically complex as sexual activity, it is usually quite difficult to show a pattern of behavior so regular and specific that it qualifies as a predictable habit.⁷⁸ Does consent with A and B on prior occasions tend to prove consent with someone else at a later date? Secondly, this use of character traits to prove unsavory conduct skirts perilously close to the old-style attack on a victim's character—an evil which rape shield rules such as M.R.E. 412 were designed to prevent.

Accordingly, the Court of Military Appeals has insisted on a clear showing of relevance before admitting evidence of unchaste "habit(s)." In *Elvine*, for example, the defense attempted to introduce evidence that would "tend to show a habit of the prosecutrix to indiscriminately engage in sex."⁷⁹ The court rejected this proffered evidence, noting that the defense "failed to aver any logical nexus between [the victim's prior] sexual acts which would justify their characterization as a pattern of behavior

⁷⁰Concern exists, however, both inside and outside the Court of Military Appeals that the recent opinions have gone too far in loosening up M.R.E. 412. See J. Little, *M.R.E. 412-The Rape Shield Law Interpreted*, Trial Counsel Forum, Vol. II, No. 8, at 2 (Aug. 1983). According to this view, the attempted clarification of the rule has vitiated its special status as an evidentiary barrier and reduced it to a "mere rule of relevance." See also *United States v. Dorsey*, 16 M.J. at 8-13 (Cook, J., dissenting); *United States v. Colon-Angueira*, 16 M.J. at 30-31 (Cook, J., concurring in part).

⁷¹16 M.J. 14 (C.M.A. 1983).

⁷²16 M.J. 164 (C.M.A. 1983).

⁷³Even if chastity evidence is "constitutionally required to be admitted," its exclusion will not be reversible error unless there is a "reasonable likelihood . . . that the excluded evidence could have affected the judgment of the trier of fact." *Colon-Angueira*, 16 M.J. at 28. Citing a number of Supreme Court cases on this point, the court in *Colon-Angueira* concluded that although the evidence was relevant, material, and favorable to the defense, reversal was not required since the evidence would have had little impact on the verdict. This leads to the apparently anomalous result that a piece of chastity evidence could be important enough to trigger an accused's constitutional rights, yet not so critical that its absence would otherwise prejudice the accused's substantive rights or be potentially outcome-determinative. See *Westen II*, *supra* note 55, at 215 n.76.

⁷⁴See *Elvine*, 16 M.J. at 16-17 *Hollimon*, 16 M.J. at 166.

⁷⁵See *United States v. Dorsey*, 16 M.J. at 3-8; *United States v. Colon-Angueira*, 16 M.J. at 22-27.

⁷⁶Berger, *supra* note 14, at 52-69; Tanford & Bocchino, *supra* note 8, at 586-89.

⁷⁷Spector & Foster, *supra* note 26, at 108-09; Tanford & Bocchino, *supra* note 8, at 581.

⁷⁸*Cf.* Spector & Foster, *supra* note 26, at 101 & n.85.

⁷⁹16 M.J. at 16.

rather than simply unrelated incidents."⁸⁰ In *Hollimon*, the court rejected a similar offer of proof and observed that "proof that a woman had sexual intercourse in her room with one male has little tendency to establish that she would also have intercourse willingly in her room with some other male."⁸¹ In short, the court has served notice that its liberal approach to relevance does not extend to evidence of quasi-habit. Unless counsel is able to meet M.R.E. 406's relatively stringent criteria for establishing a habit, such evidence remains presumptively inadmissible and may not be used to avoid the rape shield rule.

Accused's State of Mind

The recent M.R.E. 412 opinions suggest that chastity evidence may be admissible to show the accused's state of mind in two circumstances: to negate the element of specific intent in cases of attempted rape or assault with intent to commit rape; and to show the accused's mistaken belief in the victim's consent.

Rape is a general intent offense,⁸² whereas attempted rape and assault with intent to commit rape require a showing of specific intent in order to convict.⁸³ An accused's subjective belief that the victim would consent to intercourse may negate specific intent. This belief, which need only be honest but not reasonable, could arise from what the accused knows of the victim's prior sexual activity. In such a situation, chastity evidence might be constitutionally required to be admitted, even if based on reputation.⁸⁴

An issue closely related to intent is the defense of mistake of fact. In this scenario, the accused admits intercourse but claims that the victim consented. The mistaken belief about consent

must be reasonable as well as honest.⁸⁵ In a sexual context, the notion of consent often obscures a "tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants."⁸⁶ At what point does unwilling submission transform into reluctant consent? Although the Court of Military Appeals has not dealt with this slippery issue in a direct sense, Chief Judge Everett leaves no doubt that he recognizes the defense and would willingly entertain the admissibility of chastity evidence under M.R.E. 412 based on such a theory.⁸⁷ Whether Chief Judge Everett can persuade one of the other two judges to adopt his point of view remains to be seen.

Prosecutrix's State of Mind

Based on recent opinions, the Court of Military Appeals seems willing to admit chastity evidence to show the prosecutrix's state of mind in two situations: to reveal possible motive for making a false accusation; and to show an ulterior motive for consent.

In many contested cases involving nonconsensual sexual offenses, a prime issue is the credibility of the prosecutrix versus that of the accused.⁸⁸ In such a situation, the defense usually attempts to mount a vigorous attack against the prosecutrix's credibility. As already discussed, this approach led to several abuses which the present rape shield rules are designed to correct.⁸⁹ Where credibility is an issue, however, at some point the rape shield policies of protecting the privacy of victims, encouraging the reporting of offenses, and preventing the use of distracting evidence, must yield to an accused's need to present a defense.⁹⁰

⁸⁰*Id.*

⁸¹16 M.J. at 166.

⁸²*United States v. Pugh*, 9 C.M.R. 536 (A.B.R. 1953) (intoxication no defense).

⁸³*United States v. Rozema*, 33 C.M.R. 694 (A.F.B.R. 1963).

⁸⁴*See Hollimon*, 16 M.J. at 166; *Colon-Angueira*, 16 M.J. at 31 (Everett, C.J., concurring). *See also Spector & Foster*, *supra* note 26, at 110.

⁸⁵*Cf. United States v. Moore*, 15 M.J. 354, 375 (C.M.A. 1983) (Everett, C.J., dissenting); *Spector & Foster*, *supra* note 26, at 99-100.

⁸⁶Model Penal Code § 213.1, at 303. (1980).

⁸⁷*See Moore*, 15 M.J. at 375 (Everett, C.J., dissenting); *Colon-Angueira*, 16 M.J. at 31 (Everett, C.J., concurring).

⁸⁸*See cases cited supra* note 9.

⁸⁹*See supra* text accompanying notes 12-22.

⁹⁰*See supra* text accompanying notes 38-46; *cf. Spector & Foster*, *supra* note 26, at 111.

*Davis v. Alaska*⁹¹ clearly establishes that an accused has a constitutional right to present evidence that an adverse witness is biased. Accordingly, when a victim's prior sexual activity supports an inference of bias or motive to make a false accusation, such evidence is constitutionally required. This conclusion, supported by numerous state court decisions,⁹² lies at the core of the Court of Military Appeals' lead decision on rape shield issues, *United States v. Dorsey*.

In *Dorsey*, the critical issue was the credibility of the prosecutrix and the accused.⁹³ The defense tried to introduce evidence showing a motive for a false complaint of rape. After laborious analysis, the court concluded that such evidence was relevant, material, vital to the defense, and therefore, constitutionally required to be admitted.

At first glance, and as some have argued, this decision seems to punch a gaping hole in the military's rape shield rule.⁹⁴ Assertions of bias or motive need not, however, be considered a magic talisman for defeating M.R.E. 412. A number of procedural and evidentiary barriers still exist to prevent this important, and constitutionally required, exception from swallowing the rule.

Defense counsel is not entitled to conduct a fishing expedition for evidence of bias or improper motive. M.R.E. 412 requires the defense to make a written offer of proof before trial or else waive the right to introduce evidence of a victim's prior sexual conduct. Frequently, evidence that purports to reveal bias is not even probative. In making its offer of proof, the defense must be able to link any alleged bias with the reason for false accusation, or else the proffered evidence is simply irrelevant. For example, mere evidence that a victim termi-

nated a relationship with the accused's cousin some months ago has little probative value in determining possible bias against the accused.⁹⁵ In some situations, the defense can meet this nexus requirement by proving some preliminary fact.⁹⁶ As before, however, the procedural sections of M.R.E. 412 suggest that the trial judge should first rule on the existence of this factual predicate before allowing the defense to proceed.⁹⁷

Finally, even if chastity evidence is excluded, there may be no reversible error if the defense has been able to fully develop the issue of bias by other means.⁹⁸ Once again, analysis turns on whether the evidence in question is relevant (the nexus requirement), material (relationship between bias and credibility), and critical (alternative means of proof).

The recent case of *United States v. Colon-Angueira*⁹⁹ adds a novel twist to the use of sexual history to prove state of mind. In *Colon*, the court held that a prosecutrix's sexual conduct after the alleged offense was relevant to show an ulterior motive for having earlier consented to intercourse with the accused. The defense theory of the case was that the prosecutrix, having discovered her husband's infidelity, sought revenge by also engaging in extramarital sex. Her sexual encounter with the accused was merely one of a continuing series of similar vengeful acts. Defense counsel's rationale for introducing evidence of these other, later acts was the state-of-mind exception to M.R.E. 412. Realizing that such evidence was both insufficient under M.R.E. 406 to prove a habit, and also inadmissible under M.R.E. 412 to show unchaste character, the defense offered the evidence of other infidelities to show a continuing state of anger which would be probative of earlier consent.

⁹¹415 U.S. 308 (1974).

⁹²See *Woods v. State*, 657 P.2d 180 (Okla. Crim. App. 1983); *Commonwealth v. Joyce*, 415 N.E.2d 181 (Mass. 1981); *State v. Jalo*, 557 P.2d 1359 (Or. App. 1976). See also *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).

⁹³See *supra* text accompanying note 64.

⁹⁴See *supra* note 70.

⁹⁵*State v. Blum*, 561 P.2d 226 (Wash. App. 1977); *United States v. Ferguson*, 14 M.J. 840 (A.C.M.R. 1982).

⁹⁶See *Spector & Foster*, *supra* note 26, at 112.

⁹⁷Cf. M.R.E. 412(c)(3).

⁹⁸See *United States v. Ferguson*, *supra* note 96, at 844 and cases cited therein.

⁹⁹16 M.J. 20 (C.M.A. 1983).

Although ruling that the excluded evidence was admissible, the court eventually held its omission to have been harmless error.¹⁰⁰ This case highlights three significant aspects of the current imbroglio over M.R.E. 412: the Court of Military Appeals is willing to entertain complicated theories of relevance with respect to chastity evidence; if the relevance and materiality of such evidence becomes too attenuated, the court will invoke the harmless error doctrine; and the new framework for analyzing M.R.E. 412 issues places a premium on counsel ingenuity.

Practical Hints

In addition to interpreting key aspects of M.R.E. 412, the recent decisions also provide a number of practical suggestions for counsel and judges involved in rape shield litigation. Sprinkled throughout these four cases are several helpful dicta. A reading of these dicta together with the formal holdings suggests the following tactics for dealing with M.R.E. 412 issues:

Defense Counsel

- (1) Focus on relevance, constructing alternative theories when possible, regardless of complexity.
- (2) Prepare to meet the sixth amendment three-prong test for relevance, materiality, and favorableness.
- (3) Look hard for possible bias, motive, mistake of fact, or other state-of-mind factors in the behavior of both the accused and prosecutrix.
- (4) Spend little, if any, effort attempting to show habit.
- (5) Make liberal use of psychiatric testimony to bridge nexus gaps and/or to establish required factual predicates.¹⁰¹

¹⁰⁰*Id.* at 28-29.

¹⁰¹In *United States v. Colon-Angueira*, 16 M.J. at 30, Chief Judge Everett noted in his concurring opinion that:

The defense argument for the relevance of the excluded evidence would have been strengthened if... it had been coupled with an offer of psychiatric testimony linking more explicitly the infidelity of the prosecutrix's husband to her claimed urge to extract revenge by sleeping with her fellow taxi cab drivers and passengers.

- (6) Scrutinize a prosecutrix's post-offense sexual conduct as well prior sexual history.¹⁰²

- (7) Argue that the appropriate remedy for handling disputed M.R.E. 412 evidence is a limiting instruction rather than the more drastic remedy of exclusion.¹⁰³

Trial Counsel

- (1) Ensure that the defense follows the procedural requirements of M.R.E. 412(c) (notice, written offer of proof, and separate hearing).

- (2) Test any defense offer of proof against all three prongs of the *Dorsey* test.

- (3) Concentrate on breaking down defense theories of purported relevance.

- (4) Look for a nexus gap and/or missing factual predicate in the defense offer.

- (5) Characterize the defense request for M.R.E. 412 evidence as a disguised attack on the victim's character for chastity and emphasize the legislative purposes underlying rape shield rules.

- (6) Urge that, even if relevant, the evidence's probative value does not outweigh its prejudicial impact, as required by M.R.E. 412(c)(3).

- (7) Minimize the credibility battle between prosecutrix and accused as much as possible by introducing other evidence such as medical testimony.

- (8) Resist the temptation to smuggle in evidence of the victim's chaste character, thereby opening the door for defense rebuttal.¹⁰⁴

Trial Judge

- (1) Require defense counsel to articulate the precise purpose(s) for which any piece of chastity evidence is offered.¹⁰⁵

- (2) State on the record the basis for

¹⁰²See *Colon-Angueira*, 16 M.J. at 22-26.

¹⁰³See *Dorsey*, 16 M.J. at 7-8.

¹⁰⁴See *Elwine*, 16 M.J. at 18.

¹⁰⁵*Id.* at 15.

either admitting or excluding evidence of a victim's sexual history.¹⁰⁶

Conclusion

The recent spate of M.R.E. 412 opinions indicates that the Court of Military Appeals is willing to grapple with the constitutional implications of the rule. Although upholding *sub silentio* the rule's constitutionality,¹⁰⁷ the court concludes that in certain situations, M.R.E. 412 clashes with a defendant's fifth amendment right to due process and sixth amendment right to confrontation and compulsory process.

The problem, of course, is to fashion a test which will identify those situations in which chastity evidence is truly "constitutionally required," without permitting such a test to engulf the original rule. The court adopts the three-prong sixth amendment test of *Valenzuela*, although freely acknowledging that the cornerstone to M.R.E. 412 remains relevancy. The majority's liberal approach to relevance is offset by the additional requirements of *Valenzuela*,

as well as by a policy of finding harmless error if the degree of relevancy becomes too attenuated.

In key respects, the M.R.E. 412 battleground is changing shape. Before the recent decisions, there was considerable controversy over the different treatment of reputation and opinion evidence under M.R.E. 412(a) vis-a-vis evidence of specific acts under M.R.E. 412(b).¹⁰⁸ Now that the court has strongly implied that the "constitutionally required" clause applies to 412(a) as well as 412(b),¹⁰⁹ the distinction between reputation and specific acts loses much of its significance in light of the recent M.R.E. 412 cases. The battleground has now shifted to the various uses and abuses of the concept of relevance.

The court's willingness to open up M.R.E. 412 in an attempt to adjust the delicate equilibrium between constitutional rights and the rape shield concept, encourages further litigation. It remains to be seen whether the court has stepped into a quagmire or in fact succeeded in mapping out a tenable boundary line between the two shields. In any event, the decisions announced thus far pose as many questions as answers. Both counsel and judges will have to be on their toes to steer a safe passage through the intricacies of the new guidelines.

¹⁰⁶See *Hollimon*, 16 M.J. at 166-67.

¹⁰⁷At no point in its recent decisions does the Court of Military Appeals directly discuss whether M.R.E. 412 is constitutional on its face. The court focuses instead on constitutional difficulties arising from the rule's application.

¹⁰⁸See generally *Berger*, *supra* note 14; *Rudstein*, *supra* note 8; *Tanford & Bocchino*, *supra* note 8.

¹⁰⁹See *Elvine*, 16 M.J. at 18.

Highlights of the Military Justice Act of 1983

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Introduction

On 6 December 1983, the President signed the Military Justice Act of 1983.¹ Most parts of the Act will become effective on 1 August 1984. The Act will be implemented in a wholly revised

Manual for Courts-Martial.² The Joint-Service Committee on Military Justice and the Department of Defense recently made available for public comment proposed MCM provisions to

¹Pub. L. No. 98-209, 97 Stat. 1393 (1983) (amending the Uniform Code of Military Justice arts. 1-140, 10 U.S.C. §§ 801-940 (1976)).

²A draft of the proposed revised Manual for Courts-Martial was made available for public comment in May 1983. 48 Fed. Reg. 23,688 (1983). See *infra* notes 22, 28, 31 concerning those parts of the Act effective upon enactment.

implement the Act.³ It is anticipated that the President will sign the new Manual in early 1984 and that it will also become effective on 1 August 1984.

The Act makes several important changes in the military justice system, especially in the convening authority's responsibilities and in the appellate process. The Act should reduce administrative inefficiency in courts-martial and also enhance appellate protections for both the accused and the government. The Act does not detract from any rights now enjoyed by the accused.

This article will briefly describe the major changes which will be made by the Act and its implementing Manual provisions. Changes in the Manual which will be established independently of the Act will not be addressed.

Court-Martial Personnel: Substance Over Form

Most judge advocates have had the experience of putting a court-martial on "hold", keeping the military judge, counsel, members, witnesses, spectators, and others waiting while the convening authority is located in order to excuse an absent member or to bless the substitution of the judge. The Act should eliminate most of these problems. Articles 25, 26, 27, and 29 of the Uniform Code of Military Justice⁴ are amended to relieve the convening authority of the sole responsibility for decisions affecting the personnel of the court-martial.

The amendment of article 25 permits the convening authority to delegate authority to excuse members before assembly to the staff judge advocate, legal officer, or to any other principal assistant. The convening authority will remain solely responsible for the selection and detailing of members. In order to ensure that the convening authority retains fundamental responsibility for the composition of the membership, the

proposed MCM rule provides that the convening authority's delegate may not excuse more than one-third of the total number of members detailed by the convening authority.

After assembly, the delegate may not excuse members. Article 29 continues to permit the convening authority to excuse members for good cause.⁵ In addition, article 29 is amended to permit the military judge to excuse members after assembly for good cause. Therefore, ordinarily it should not be necessary to secure the personal approval of the convening authority to excuse a member at any stage of the court-martial.⁶

The amendment of articles 26 and 27 eliminates the requirement for the convening authority to personally detail the military judge and counsel; who will detail them will be left to service regulations. Authority to detail may be delegated and subdelegated. The proposed MCM provision does not require a written order detailing the military judge or counsel. An oral announcement on the record of who detailed such personnel will suffice. In the Army, judges will be detailed by the Trial Judiciary, defense counsel by the Trial Defense Service, and trial counsel within the office of the local staff judge advocate. Military judges and counsel will be able to detail themselves when appropriate.⁷ Another piece of paper which can be dispensed with under the Act is the request for trial by military judge alone. Article 16 of the UCMJ is

⁵"Good cause" includes physical disability, military exigency, and similar unusual circumstances. See *United States v. Greenwell*, 12 C.M.A. 331, 29 C.M.R. 147 (1960).

⁶However, if the membership of the court-martial is reduced below a quorum, only the convening authority can remedy this problem because the convening authority has sole power to detail members.

⁷The Act also amends UCMJ art. 38(b)(6) to provide that when the accused has individual military counsel, the authority who detailed the defense counsel, not the convening authority, will decide whether detailed counsel will continue on the case. In addition, UCMJ art. 38(b)(7) is amended to prohibit limitations on the availability of individual military counsel based solely on the grounds that such counsel is from a service different from the accused's. Proposed Manual changes will provide that interservice requests will be treated in the same manner that the service of the requested counsel treats intraservice requests.

³A draft of the proposed changes in the draft Manual was made available for public comment in December 1983. 48 Fed. Reg. 54,263 (1983).

⁴Uniform Code of Military Justice arts. 25-27, 29, 10 U.S.C. §§ 825-827, 829 (1976) [hereinafter cited as UCMJ].

amended to permit the accused to request trial by military judge alone orally on the record or in writing.

These changes make the selection and excusal of court-martial personnel less formalistic and administratively burdensome. The Senate Report on the legislation makes clear this intent: "Under these amendments, errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required composition of a court-martial will be tested solely for prejudice under Article 59."⁸

The Convening Authority: A Commander Not A Lawyer

The Act eliminates any requirement for the convening authority to examine the case for legal sufficiency before or after a court-martial. The convening authority retains the authority to decide whether to refer a case to trial; to approve, disapprove, suspend, or reduce the sentence; and to disapprove findings of guilty. Because the convening authority will not be required to consider legal questions or factual sufficiency, the staff judge advocate's pretrial advice will be much shorter, and the lengthy post-trial review will become a brief recommendation.

Under article 34 of the UCMJ, the convening authority will no longer have to find that "the charge alleges an offense...and is warranted by the evidence indicated in the report of investigation" before a charge may be referred to a general court-martial. In order to protect the accused against baseless charges, the staff judge advocate must determine whether the specifications allege offenses, are warranted by the evidence in the article 32 investigation report, if any,⁹ and are subject to court-martial jurisdiction. The convening authority may not refer charges to a general court-martial without the staff judge advocate's written conclusions that these three prerequisites have been met. The staff judge advocate will also make a written recommendation as to disposition and

may include other matters in the advice which the staff judge advocate believes the convening authority should consider, but there is no legal requirement for these other matters. Therefore, a legally sufficient pretrial advice will require no more than a few sentences.

After trial, the changes in the convening authority's responsibilities are even more substantial, especially because they affect the obligations of the staff judge advocate and the defense counsel. The convening authority will not be required to review the case for factual sufficiency or legal error. The convening authority retains, as a prerogative of command, all the powers he or she now has with respect to the findings and sentence. Because the convening authority is not required to examine the case for legal error or factual sufficiency, the staff judge advocate is not required to prepare a lengthy review discussing the evidence and legal issues. Instead, the staff judge advocate will file a brief recommendation. At the same time, the defense's opportunity to submit matters for consideration will be expanded.

After a general court-martial or a special court-martial in which a bad-conduct discharge is adjudged, the accused will have thirty days from the date the sentence is announced, or seven days from receipt of the record of trial,¹⁰ whichever is later, to submit matters to the convening authority. The time periods are shorter in other special courts-martial and in summary courts-martial.¹¹ The record of trial will be prepared under the same requirements as currently exist. The matters submitted by the defense may include allegations of errors in the proceedings, citations to parts of the record, and clemency materials.¹²

¹⁰The record may be served on either the accused or defense counsel. See H.R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983).

¹¹In special courts-martial, the accused will have twenty days after the sentence is announced, or seven days from receipt of the record of trial, to submit matters. In summary courts-martial, the accused will have seven days after the sentence is announced. The convening authority may extend these periods for good cause, but not beyond specified limits.

¹²Failure to allege errors in the trial proceedings does not waive their consideration by appellate or other reviewing authorities.

⁸S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

⁹The Act provides that the UCMJ art. 32 investigation may be waived by the accused.

After completion of the record of a general court-martial or a special court-martial in which a bad-conduct discharge was adjudged, the staff judge advocate will prepare a written recommendation. The proposed MCM provision requires the recommendation to include a statement of the findings and sentence of the court-martial, a summary of the accused's service record, a statement of the nature and duration of pretrial restraint, a statement of any action required under a pretrial agreement, and a recommendation as to disposition. The staff judge advocate is not required to examine the record for, or discuss, legal errors. If an error is discovered by the staff judge advocate, he or she may bring this to the attention of the convening authority and recommend corrective action. If the defense submits allegations of error, the staff judge advocate must state whether corrective action is necessary. A simple statement of agreement or disagreement with the allegation is all that is necessary; an analysis or rationale is not required.

The Act incorporates the requirement of *United States v. Goode*¹³ by requiring the staff judge advocate to serve the recommendation on defense counsel before submission to the convening authority. The defense counsel has five days in which to respond.¹⁴ Errors in the recommendation not raised are waived.

After receipt of the staff judge advocate's recommendation and any matters submitted by the defense, the convening authority takes action. The convening authority still exercises the same powers over the findings and sentence as now exist, and gains some additional authority as to execution of the sentence. The convening authority is not required to review the findings. He or she may, however, reduce any finding of guilty of an offense to a lesser included offense, and may disapprove any finding of guilty and dismiss the charge or order a rehearing. Note that although the convening authority is not required to review the case for legal errors, the power to order a rehearing permits corrective

action to be taken promptly when an error is discovered. The convening authority also retains the power to order proceedings in revision.

Similarly as to the sentence, the convening authority can still approve it, disapprove it and order a rehearing, reduce it, change parts of it, or suspend it. In addition, under an amended article 71, UCMJ, the convening authority can, in every case, order the sentence executed except those parts extending to death, dismissal, or a dishonorable or bad-conduct discharge. Thus, if the approved sentence includes a bad-conduct discharge, confinement for fifteen months, forfeiture for fifteen months, and reduction to the lowest enlisted grade, the confinement, forfeiture, and reduction could be ordered executed in the convening authority's action. No more will approved forfeitures be applied or be dependent on, inclusion of confinement in the sentence. Confinement, but not forfeitures, may be deferred. Convening authority actions will have to be carefully monitored to ensure that they are consistent with these changes, but compliance should be much simpler under the new requirements.

On the whole, these changes leave the legal review of courts-martial to the appellate courts or The Judge Advocates General. At the same time, they continue the convening authority's power to exercise command prerogative to reduce the severity of the findings and sentence, and to take corrective action when necessary to avoid undue expense or delay. This is a more appropriate allocation of responsibility.

Appellate Matters: Something for Everyone

The Act makes three major changes with respect to appellate matters in the military justice system. First, it authorizes the government to appeal certain adverse rulings by the military judge. Second, it permits the accused to waive appellate review, except in capital cases. Third, it provides for review, on writ of certiorari, by the Supreme Court of cases reviewed by the Court of Military Appeals.¹⁵

¹³United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

¹⁴The convening authority may extend this period up to twenty additional days for good cause.

¹⁵Several other changes of note are made in military appellate practice. First, UCMJ art. 66 is amended to eliminate cases involving general and flag officers as a separate category of cases subject to review by the Courts of Military

Article 62 of the UCMJ is amended to allow the government to appeal to the appropriate Court of Military Review a ruling by the military judge which "terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding." A ruling tantamount to a finding of not guilty cannot be appealed. Under this article, however, a ruling dismissing a charge or granting a motion to suppress could be appealed. The proposed MCM provides, in effect, that each service can establish procedures for determining when the government will appeal. It would be highly disruptive of individual cases, not to mention trial dockets and the business of the Courts of Military Review, if the government frequently appealed trial rulings. Therefore, it is anticipated that the staff judge advocate and the Government Appellate Division will be involved in determining whether to appeal. The proposed MCM provides, however, that in order to preserve the government's right to appeal, the trial counsel is entitled to a delay upon demand following an adverse ruling. The proposed MCM also provides procedures for proceeding with or severing charges and specifications unaffected by the ruling.

Article 61, UCMJ, will permit the accused to waive or withdraw from appellate review, except in capital cases. Under this provision, the accused must affirmatively withdraw from or waive, in writing, appellate review. The waiver or withdrawal must be signed by the accused and defense counsel. In the absence of such a waiver or withdrawal, the case will be reviewed in accordance with the same requirements as currently exist.

Review and automatic review by the Court of Military Appeals. These cases will be subject to the same standards for review as any other case. Second, the Courts of Military Review will be empowered, under art. 66, to reconsider panel decisions *en banc*. This eliminates the restrictive interpretation of those courts' powers in *United States v. Wheeler*, 20 C.M.A. 595, 44 C.M.R. 25 (1971) and *United States v. Chilcote*, 20 C.M.A. 283, 43 C.M.R. 123 (1971). Third, the Act amends UCMJ art. 69 to authorize The Judge Advocates General to consider sentence appropriateness and to reassess the sentence in cases examined or reviewed under UCMJ art. 69.

In order to ensure that a waiver or withdrawal is filed with an understanding of the consequences, the proposed MCM will include several requirements. First, at the conclusion of each general or special court-martial, the military judge will be required to explain to the accused his or her post-trial and appellate rights and the consequences of waiving them.¹⁶ A trial guide in the appendices of the Manual will include guidance in this regard. Second, the Manual will include sample waiver/withdrawal forms, to be executed by the accused when he or she elects to waive or withdraw. Primary responsibility for advising the accused on waiver or withdrawal of appellate review will fall on the shoulders of the accused's counsel. Because the consequences of foregoing appellate review are substantial, defense counsel will want to develop a thorough advice on this matter.

The accused may file a waiver within ten days after the convening authority's action. The convening authority may extend this period on request by the accused. Moreover, the accused may file withdrawal of the appeal any time before review is completed. Once filed, a waiver or withdrawal may not be revoked. Because the accused may be separated from trial or appellate defense counsel at the time a decision to waive or withdraw is made, the proposed MCM includes authority to appoint associate counsel. Such counsel must communicate with the primary counsel before a waiver or withdrawal can be executed. This ensures that the accused has the benefit of both the primary defense counsel's opinions and first hand advice in each case.

If review by the Court of Military Review or examination by The Judge Advocate General is waived or withdrawn, the case must still be reviewed by a judge advocate.¹⁷ The judge advocate will prepare a written review stating whether the court-martial had jurisdiction,

¹⁶This is based on S. Rep. No. 53, 98th Cong., 1st Sess. 18 (1983).

¹⁷Under the new UCMJ art. 64, such review is also required in all special courts-martial in which a bad-conduct discharge was not adjudged and in summary courts-martial.

whether the charges and specifications allege offenses, and whether the sentence was within legal limits. If the defense submits allegations of error, the judge advocate must state whether they merit relief. If the case involves an approved sentence to confinement for more than six months, dismissal, or a punitive discharge, or if the judge advocate recommends corrective action, the case must be forwarded to the person exercising general court-martial convening authority over the accused at the time the court-martial was convened or to a successor. Other cases are final upon completion of the judge advocate's review. The general court-martial convening authority then takes final action, to include ordering previously unexecuted and unsuspended parts of the sentence executed (except a dismissal, which still must be approved by the service Secretary). However, if the judge advocate recommends corrective action and the general court-martial convening authority did not take action at least as favorable to the accused as that recommended, the action and the record must be forwarded to The Judge Advocate General for review.¹⁸ Therefore, every case, even if the accused waives appellate review, will be reviewed by a lawyer at least once before it is final.

The third change in the appellate area will permit both the accused and the government to petition the Supreme Court for review, on writ of certiorari, of cases reviewed by the Court of Military Appeals.¹⁹ Note that cases not actually reviewed by the Court of Military Appeals are not subject to review by the Supreme Court. Therefore, if a case never reaches the Court of Military Appeals, or if the Court of Military Appeals denies a petition for review, the case could not reach the Supreme Court under this

change.²⁰ This part of the Act will certainly have less immediate effect than most of the other changes, yet it is potentially the most important because of its long term effect on military justice.

Other Changes

The Act includes a number of other significant changes in a variety of areas. For example, the Act amends article 1, UCMJ, to permit videotape or audiotape records of trial, and amends article 49, UCMJ, to permit similarly recorded depositions. The latter change is likely to have a more practical effect; because of the difficulties in reviewing a recorded record of trial, such records may be used only in limited circumstances.²¹ On the other hand, taped depositions can be useful substitutes for testimony. The person who directs the deposition will have discretion whether it will be recorded by video or audiotape, or transcribed.

Another important change is designed to eliminate a possible windfall for an accused at a rehearing. Article 63, UCMJ, is amended to provide that at a rehearing, an accused cannot retain the benefit of a pretrial agreement if the accused does not continue to fulfill the agreement. Thus, if after the original trial the convening authority reduced the accused's sentence pursuant to a pretrial agreement, that reduced sentence will establish the maximum sentence limitation at rehearing only if the accused adheres to the agreement and does not change the earlier pleas of guilty at the rehearing. If the accused does change the pleas of guilty, then the maximum permissible punishment at the rehearing would be the sentence adjudged at the earlier court-martial without regard to the convening authority's reduction of it under the agreement.

The Act expressly limits the power of the Boards for Correction of Military Records and the Discharge Review Board to review court-

¹⁸Note that even a special or summary court-martial must be forwarded to The Judge Advocate General in such cases.

¹⁹In addition to amending UCMJ art. 67, the Act amends Title 28, United States Code, to allow this result.

²⁰Senator Kennedy urged the Court of Military Appeals to consider modifying its procedures for granting review with a view toward increasing the number of cases eligible for Supreme Court review. See 129 Cong. Rec. S.16837 (daily ed., Nov. 18, 1983).

²¹See *United States v. Barton*, 6 M.J. 16 (C.M.A. 1983).

martial convictions. These boards may not modify, as a matter of law, findings or sentences of courts-martial. They may, however, grant clemency on the sentence of a court-martial.²²

Finally, the Act creates a new punitive article under the UCMJ, article 112a, to specifically prohibit conduct involving contraband drugs. This article is consistent with the 1 October 1982 change to the Manual for Courts-Martial concerning drug offenses.²³ Consequently, it should have little practical effect on the prosecution of offenses involving controlled substances, other than to eliminate prejudice to good order and discipline or discredit to the service as an element of the offense, which may be important in some cases.²⁴ Of greater import is the fact that Congress has expressly recognized "the substantial dangers to morale and readiness created by drug abuse"²⁵ and has taken action to prevent them.

Studying Military Justice

Two other changes of potential, but not immediate, importance to the administration of military justice involve bodies responsible for studying it. The Act modifies the composition of the Code Committee and establishes a separate commission to examine several questions with respect to the military justice system.

The Code Committee is charged by Congress to annually review the operation of the UCMJ, and to make recommendations concerning it, as appropriate.²⁶ Currently the Code Committee consists of the judges of the Court of Military Appeals and The Judge Advocates General. The Chief Counsel of the Coast Guard generally sits on the Committee on behalf of the General Counsel, Department of Transportation,²⁷ and the

Director, Judge Advocate Division, Headquarters, United States Marine Corps has sat as an unofficial member. The Act recognizes this and makes these two officers official members. In addition, the Act requires the Secretary of Defense to appoint two members of the public to the Code Committee. Over the years the members of the Code Committee have not always shared identical points of view, and this provision will encourage an even wider range of opinions in that advisory committee.²⁸

The Act also establishes a nine-member commission to study several possible changes to the UCMJ. At least three of the members of the commission will be members of the public who are not employed by the United States. The commission is to study whether sentencing should be by the military judge in all noncapital courts-martial, whether military judges and the Courts of Military Review should have the power to suspend sentences, and whether military judges should have some form of tenure. The commission will also examine whether the jurisdiction of special courts-martial should be increased to authorize confinement for up to one year. Finally, the commission will consider modification of the retirement system for judges of the Court of Military Appeals, and whether the Court of Military Appeals should be an article III court.²⁹ None of these issues presents easy solutions.³⁰ The commission's report is due on 1 September 1984.³¹ Whatever its recommendations, the report is likely to be the focal point of any legislative initiatives in the future.

²²This part of the Act became effective on 6 December 1983.

²³See Manual for Courts-Martial, United States, 1969 (Rev. ed.) paras. 127c, 213g; Exec. Order No. 12,383, 47 Fed. Reg. 42,317 (1982).

²⁴*Cf.* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (discussing proof of conduct prejudicial to good order and discipline).

²⁵S. Rep. No. 53, 98th Cong., 1st Sess. 29 (1983).

²⁶UCMJ art. 67(g).

²⁷See UCMJ art. 1(1).

²⁸This part of the Act was effective on 6 December 1983. The Secretary of Defense has not yet named the public members.

²⁹U.S. Const. art. III. Although not part of the Act, the House Armed Services Committee directed that the Commission study this last question. H.R. Rep. No. 549, 98th Cong., 1st Sess. 17 (1983).

³⁰Indeed, most of the issues before the commission are there because there was some dispute about their merits when they were considered by the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. See S. Rep. No. 53, 98th Cong., 1st Sess. 30-32 (1983).

³¹This part of the Act became effective on 6 December 1983. The Secretary of Defense has not yet named the commission.

Conclusion

The Military Justice Act of 1983 will make the most sweeping changes in the military justice system since the Military Justice Act of 1968. Coupled with the extensive changes in the Manual for Courts-Martial, the Act will make 1984 a watershed in Military Justice. Of course, cases will still be resolved based on their facts,

the ability of counsel to present the case, and the wisdom of judges, members, commanders and others charged with deciding the many legal and factual issues embraced in them. These changes, however, should eliminate some administrative headaches from that process and provide a more comprehensive system for reviewing the issues which remain.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Standards of Conduct) **Acceptance of Promotional Gifts While Traveling on Official Business.** DAJA-AL 1983/1369 (28 March 1983).

There is no legal objection to DA military or civilian members accepting, while performing official travel, promotional gifts furnished by airlines, rental car companies and other commercial companies, provided the members do so only on behalf of the government. Such gifts become Army property upon the member's acceptance. Retention by the member of such gifts obtained incident to the performance of official duty, however, is objectionable since this would constitute additional compensation from private sources, which is generally prohibited. Additionally, para. 2-2b, AR 600-50 generally prohibits DA personnel from accepting any gratuity for themselves, members of their families, or others from any source that may be a DOD contractor or is otherwise significantly affected by official actions.

(Military Installations-Law Enforcement) **Agreements to Indemnify Local Police Agencies That Provide Protection for Military Installations Are Contracts.** DAJA-AL 1983/1468 (8 April 1983).

Fort Douglas, Utah, is an area of exclusive federal jurisdiction that is protected by one civilian contract guard. The commander of Fort Douglas requested assistance from the supporting staff judge advocate in obtaining back-up police protection from the Salt Lake City police department. The SJA advised the commander

that local police officers would have only citizen's arrest powers on the installation. However, Salt Lake City officials stated that they would require the United States to indemnify and hold harmless Salt Lake City and individual police officers before extending police protection to the installation. The SJA requested advice regarding the propriety of such an arrangement and forwarded a proposed draft memorandum of understanding that would protect the civilian police officers by making them agents of the federal government.

The Judge Advocate General advised that the Department of Justice's policy is that state and city policemen will not be made agents of the federal government by agreement with a federal agency. The Judge Advocate General opined that the proposed agreement was actually a contract in which indemnification or payment for private insurance would be consideration for Salt Lake City to provide protection. Because it would be a contract, it would have to be entered into in compliance with applicable law and regulation. However the 1983 DOD Authorization Act, § 1111 (Pub. L. No. 97-252) prohibits the use of appropriated funds to enter into new security guard contracts for military installations. A contract for police protection will be possible only if this prohibition is not continued in the 1984 DOD Authorization Act.

This kind of agreement should be distinguished from an agreement to provide such services without cost to the government which

was approved in DAJA-AL 1981/3267 (31 July 1981). Because of the nature of this question and the associated problems with exclusive jurisdiction, The Judge Advocate General concurred in

the FORSCOM recommendation that retrocession of exclusive jurisdiction could provide an effective long-term solution.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

Travel Refunds Possible

Military attorneys with legal assistance clients who dealt with the Davis Agency and lost money due to the firm's irregular business activities may be entitled to recoup losses based on a recent federal district court ruling.

For several years, the Davis Agency operated public charters and overseas military personnel charters between the U.S. and Europe. The firm was the subject of frequent complaints to legal assistance attorneys in Europe by military personnel who purchased tickets that were not delivered before flight time and various other unethical business practices.

Davis closed its charter sales offices in Germany in November 1982 and is involved in bankruptcy proceedings. On October 17, 1983, the U.S. District Court for the Eastern District of Virginia ruled that approximately \$180,000 remaining in a trust fund set aside to pay consumer claims must be used to pay such claims before commercial creditors will be entitled to share in the fund.

Legal assistance attorneys with clients who may have claims against Davis should address the claim to: Boothe, Prichard & Dudley, ATTN: Mr. Terrence Ney, P.O. Box 338, Fairfax, VA 22030.

IRS Suspends Action

There has recently been a great deal of publicity concerning a proposed IRS revenue ruling which would have the effect of denying military personnel a deduction for that portion of home mortgage interest and real estate tax payments claimed on tax returns which are attributable to BAQ and VHA payments.

The Internal Revenue Code has always provided that taxpayers may not take deductions

which are allocable to tax-exempt income. Although tax exempt, BAQ and VHA have never been considered to fall within that category and mortgage expenses of military homeowners have been deductible.

That was recently placed in doubt when the IRS issued Revenue Ruling 83-3. Although the ruling did not specifically address the BAQ/VHA situation, it applied to ministers who receive tax-free rental and utility allowances from their churches and who also claim home mortgage interest and property tax deductions. The ruling held that ministers may not deduct interest and taxes paid on a personal residence to the extent the amount expended is allocable to tax-exempt income.

The IRS, however, advised that application of the ruling to military personnel would be at the discretion of individual auditors. The Legal Assistance Branch has now been advised that the IRS has decided to postpone, through 1984, the application of the ruling to military personnel. Individual auditors will not be free to apply it to military personnel pending issuance of another revenue ruling which will specifically address military personnel and BAQ/VHA payments.

Reserve Committee Formed

Seventeen reserve judge advocates have been appointed to the Reserve Judge Advocate Legal Assistance Advisory Committee, which was authorized by Major General Clausen to assist The Judge Advocate General's School's Legal Assistance Branch. The Committee will advise the Legal Assistance Branch on changes in state laws and assist in updating, revising and expanding the All-States Guides published by the Branch. Other committee objectives are to submit timely reports on selected topics in legal

assistance, recent legal developments, recommended approaches and model forms, and to answer specific state law questions submitted by the Branch.

When fully operational, the Advisory Committee will be composed of at least one reserve officer appointed from each state and territory. The seventeen reserve judge advocates initially selected have been appointed "Special Legal Assistance Officers" under para. 5b(2), AR 608-50.

The seventeen attorneys and their respective jurisdictions are: Kentucky—Major M. Kirby Gordon II, Owensboro, KY; Pennsylvania—LTC Charles B. Smith, West Chester, PA; New Jersey—LTC James B. Smith, Metuchen, NJ; North Carolina—Major Mark Sullivan, Raleigh, NC; Wyoming—Captain James L. Edwards, Gillette, WY; Maine—Colonel Peter A. Anderson, Bangor, ME; Louisiana—Major John A. Exnicios, New Orleans, LA; Maryland—Captain Richard C. Goodwin, Annapolis, MD; Colorado—LTC Simon E. Timmermans, Fort Collins, CO; California—Major Peter D. Pettler, Wilmington, CA; Missouri—Captain Charles H. Blair, Springfield, MO; Massachusetts—1LT Richard W. Gordon, Somerville, MA; Nevada—LTC John D. O'Brien, Las Vegas, NV; Puerto Rico—Major Guillermo Silva-Janer, Bato Rey, PR; Illinois—Captain Alois C. Wolski, Hickory Hill, IL; and Ohio—LTC Anthony A. Cox, Cleveland, OH.

Another series of appointments will be made in the near future. It is anticipated that by the summer of 1984, the Advisory Committee will be fully operational. The Advisory Committee is under the direct supervision of the Chief, Administrative and Civil Law Division, TJAGSA, Lieutenant Colonel John Cruden.

Appointments to the Committee are for a one-year period, commencing January 1, 1984. USAR judge advocates interested in being considered for appointment to the Committee and who have not yet applied should submit a letter requesting consideration, with a current resume, to The Judge Advocate General's School, ATTN: ADA-LA, Charlottesville, VA 22901. Committee members in jurisdictions for which appointments have not yet been made

will be selected on the basis of their legal expertise in legal assistance-related areas of the law (e.g., wills, family law, taxation).

Resource Materials Mailed

Legal assistance offices world-wide recently received new editions of the All-States Will and Consumer Law Guides. Sufficient copies were printed to provide each legal assistance office with one copy per office. Printing costs do not permit providing more than one copy per office; however, both editions have been placed in the Defense Technical Information Center (DTIC) and can be ordered in both hard copy and microfiche formats at minimal costs. The ordering number for the Consumer Law Guide is AD B077738 and the ordering number for the Will Guide is AD B077739. Both are \$3 each per hard copy and 95 cents each per microfiche. They can be ordered from DTIC, Cameron Station, Alexandria, VA 22314.

Additionally, several other sets of materials have been mailed by the Legal Assistance Branch. These include:

- 1984 All States Income Tax Guide.
- A new edition of the All States Garnishment Guide, dated November 1983.
- A 1984 revised edition of a Directory of Voluntary Agencies to assist in Immigration and Naturalization cases.

Each legal assistance office was sent at least one copy of the All States Income Tax Guide and one copy each of the Garnishment Guide and the Directory of Voluntary Agencies. Again, budget constraints preclude mailing more than one copy of the Garnishment Guide, but it has been forwarded to DTIC and soon may be ordered through that system. The Air Force, which is the proponent of the All States Income Tax Guide, has been requested to include that publication in DTIC.

The revised All States Marriage and Divorce Guide has been sent to the printer and will be mailed in the near future.

SOLAR Program

Staff Judge Advocates and Chiefs of Legal Assistance may be interested in an innovative program developed in 2d Armored Division,

Fort Hood, Texas: the Senior Officer Legal Affairs Review (SOLAR).

The program is designed to insure that senior officers and commanders receive timely legal assistance for their own personal needs. Under the program devised by LTC Ken Gray, senior officers are encouraged to make sure "your legal affairs are in order" by a personal letter from the chief of staff. A checklist of potential legal assistance issues accompanies the letter. The letter also indicates that the staff judge advocate will soon be contacting them to arrange for a convenient time for a legal assistance attorney to meet with them. The attorney then meets with the senior officer at his or her office to discuss legal preparedness and planning.

Such a program can be of great benefit to the overall legal assistance program. It provides an important vehicle to acquaint senior officers with the legal assistance program and to educate them on the range of services available through Army Legal Assistance. Further, these exceptionally busy officers rarely have an opportunity to seek and obtain legal services during the normal duty day. This excellent program is also a method of getting legal assistance attorneys more actively involved in command activities. The following is the checklist devised by 2d Armored Division to accompany the cover letter by the chief of staff. You would, of course, have to tailor the list to your particular clientele.

SENIOR OFFICER LEGAL AFFAIRS REVIEW (SOLAR)

Please indicate which areas of your legal affairs you would like the 2d Armored Division Staff

Judge Advocate's Legal Assistance Office to assist you with.

- ☐ 1. Personal Affairs.
 - ☐ 2. Debts and Obligations.
 - ☐ 3. Real Property.
 - ☐ 4. Wills.
 - ☐ 5. Life Insurance.
 - ☐ 6. Casualty Insurance.
 - ☐ 7. Medical Insurance.
 - ☐ 8. Vehicle Titles and Registration.
 - ☐ 9. Income Tax.
 - ☐ 10. Estate Tax.
 - ☐ 11. Estate Planning.
 - ☐ 12. Leases.
 - ☐ 13. Family Law (i.e., Marriage, Divorce, Adoptions, etc.).
 - ☐ 14. Survivor Benefits.
 - ☐ 15. Residency.
 - ☐ 16. Power of Attorney.
 - ☐ 17. Soldiers' and Sailors' Civil Relief Act.
 - ☐ 18. Personal Injury.
 - ☐ 19. Citizenship, Immigration and Passports.
 - ☐ 20. State Residency.
 - ☐ 21. Civilian Criminal Matters.
 - ☐ 22. Contracts.
 - ☐ 23. Employment Rights and Benefits.
 - ☐ 24. Other Miscellaneous Legal Areas.
-
-
-

New LAMP Committee Representative

Captain Thomas McShane has been appointed to replace Captain Bruce Kasold as the Young Lawyer's Division representative to the ABA's Standing Committee on Legal Assistance for Military Personnel (LAMP).

Reserve Affairs Items
Reserve Affairs Department, TJAGSA



DEPARTMENTS OF THE ARMY AND THE AIR FORCE

NATIONAL GUARD BUREAU

WASHINGTON, D.C. 20310

Expires: 1 July 1984

REPLY TO
ATTENTION OF

NGB-JA

7 December 1983

SUBJECT: ARNG Judge Advocate Training

The Adjutants General of All States, Puerto Rico, the Virgin Islands, Guam and the District of Columbia

1. The Judge Advocate General's School (TJAGSA) has reserved sixty spaces for ARNG judge advocates at the Judge Advocate General Service Organization (JAGSO) Team Training program to be conducted at Charlottesville, Virginia on 18-29 June 1984. This is the first time the ARNG has received a quota for this course.
2. The JAGSO Team Training program is designed to provide two weeks of instruction on specific functional legal areas to Army reserve component judge advocates. Instruction is conducted annually with subject matter repeating on a three-year cycle. The 1984 program will focus on Administrative and Civil Law. International Law and Contract Law will be covered in 1985, and Criminal Law in 1986. In addition to the specialty training, instruction is provided in other legal areas in which significant changes have occurred. For example, although Administrative and Civil Law will receive primary emphasis in the 1984 course, at least four hours of instruction will be given on the latest revisions to the Manual for Courts-Martial and the Military Justice Act of 1983.
3. Attendance at the JAGSO Team Training program is limited to ARNG judge advocates who have completed the Judge Advocate Officer Advanced Course and who are assigned duties reasonably

NGB LOG 84-206

NGB-JA


7 December 1983

SUBJECT: ARNG Judge Advocate Training

related to the functional area (in this case, Civil and Administrative Law) scheduled for instruction. Attendance may be in annual training status or utilizing other FTTD mandays available to your State; attendance in annual training status is encouraged to the extent consistent with your mission requirements.

4. Application for attendance should be made through the ARNG Military Education Branch (NGB-OAC-ARO-ME). Questions concerning the course should be directed to CPT Mark Zanin, NGB-JA, AUTOVON 225-1588.

5. The JAGSO Team Training program should not be considered a substitute for the Reserve Component Technical (On-Site) Training Program conducted by TJAGSA annually at various locations throughout the country. The schedule for the on-site program already has been furnished to you. Maximum attendance by all judge advocates at these on-site training sessions is strongly encouraged.



EMMETT H. WALKER, Jr.
Lieutenant General, USA
Chief, National Guard Bureau

DISTRIBUTION:

AG (1)

IMA Vacancies on US Army Court of Military Review

The US Army Court of Military Review currently has five vacancies in grades 05 and 06 for IMA judges. IMA judges are sworn into the Court and detailed as sitting judges during their annual training period. They are fully responsible for their case load in the same manner as their active duty counterparts. All interested IMA officers are encouraged to apply; individuals with appellate court experience are especially sought. Further information is available from the Office of the Commander, US Army Legal Services Agency, Nassif Building, Falls Church, VA 22041, AUTOVON 289-1862, COM (202) 756-1862; or from Director, Reserve Affairs Department, The Judge Advocate General's School, US Army, Charlottesville, VA 22901, FTS 939-1301/1209, COM (804) 293-6121/6122. Applications for these positions should be submitted to the Director, Reserve Affairs Department, TJAGSA.

Enlisted Update

Sergeant Major Walt Cybart



Goals

During the past six months I made several visits, including a trip to Europe. In the course of these visits, I had the opportunity to discuss several of the "problems" affecting the JAG enlisted corps. Both SFC Sture and I are concentrating on a list of goals approved by TJAG in an attempt to eliminate these problem areas. These goals are:

1. Solve our promotion problems.
2. Create and implement legal center concepts at Army installations.
3. Establish a Primary Training Course (PTC) and Basic Training Course (BTC) for our career soldiers.
4. Resurrect the Legal Clerks Handbook.
5. Bring civilian court reporter standards in line with military standards.
6. Revise Resident and nonresident 71D and Advanced Noncommissioned Officers Course (ANCOC) curriculum to include legal subject matter.
7. Move ANCOC to TJAGSA.
8. Obtain certification of lawyers' assistants through an affiliation agreement with the ABA.
9. Create E9 positions at the 71D and 71E schools.
10. Enforce a fair and equitable assignment policy.

Obviously, the above concepts are long-range goals. However, some of the necessary steps

toward their realization are already underway. A change to AR 611-201 is being staffed with the MACOM which will alleviate our E7 overstrength and open up promotions down through E6. A draft revision on the Legal Clerks Handbook is being prepared and BTC and PTC programs of instruction are being drafted. A fair and equitable reassignment policy will continue being used for all ranks. Overseas assignments are based on equitable criteria, the primary one being DROS. My general policy is: when it's your turn, you either go or get out. Of course, there are always exceptions to this policy, such as compassionate considerations. As a general rule, "homesteading" will not be allowed.

Some of these goals will be difficult to realize without total cooperation from the corps. Accordingly, I solicit your help to achieve these goals which I believe will serve our corps well.

Chief Legal Clerk/Senior Court Reporter Refresher Training Course

The Chief Legal Clerk/Senior Court Reporter Refresher Training Course has been confirmed for 21-25 May 1984 at TJAGSA. Do not forget that the University of Virginia graduation is scheduled for the weekend of 18-20 May and all motels and hotels in the area are completely booked. Do not make arrangements to arrive in Charlottesville prior to 21 May. Rooms will *not* be available.

CLE News

1. Change to On Site Instruction—MCM, 1984 Schedule

The On Site Instruction—MCM, 1984 schedule published in the January 1984 issue of *The Army Lawyer* states that the instruction will be held at Fort Bliss, TX on Wed, 16 May 1984. The

date of the instruction has been changed to Thurs, 17 May 1984.

2. 9th Annual Homer Ferguson Conference

The 9th Annual Homer Ferguson Conference will be held at the George Washington Univer-

sity Marvin Center on 16 and 17 May 1984. Those interested in details of the Conference should contact Mr. Robert V. Miele, U.S. Court of Military Appeals, 450 E Street N.W., Washington, D.C. 20442; telephone (202) 693-7106.

3. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, US Army, Charlottesville, Virginia 22901 (Telephone: AUTO-VON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

4. TJAGSA CLE Course Schedule

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Contract Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

May 22-25: Chief Legal Clerks/Court Reporter Refresher Training

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training

June 18-29: JAOAC Phase IV.

July 9-13: 13th Law Office Management (7A-713A).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-18: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17, 1985: 33rd Graduate Course (5-27-C22).

August 20-24: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference

October 15-December 14: 105th Basic Course (5-27-C20).

5. Civilian Sponsored CLE Courses

May

2-4: FJC, Seminar for Bankruptcy Judges, Norman, OK.

3-5: ABICLE, Corporate Law, Point Clear, AL.

3-5: GICLE, Real Property Law Institute, St. Simons Is., GA.

4: UMKC, Federal Estate Planning Symposium, Kansas City, MO.

4: PBI, Pennsylvania Appellate Practice, Warren, PA.

- 4-5: ATLA, Use of Medical Experts, Atlanta, GA.
- 5: NJCLE, Handling Witnesses; Effective Summation, Saddle Brook, NJ.
- 5-6: FBA, 9th Annual Indian Law Conference, Phoenix, AZ.
- 5-6: FBA, 8th Annual Tax Law Conference, Washington, DC.
- 6-12: ATLA, Basic Course in Trial Advocacy, Washington, DC.
- 8: GICLE, Time Management for Lawyers, Atlanta, GA.
- 9: GICLE, Time Management for Secretaries, Atlanta, GA.
- 10: GICLE, Time Management—Refresher, Atlanta, GA.
- 10-11: ASLM, Hospices: Legal, Medical, & Ethical Issues, Chicago, IL.
- 10-11: SLF, Wills & Probate Institute, Dallas, TX.
- 10-12: ALIABA, Fundamentals of Bankruptcy Law, Minneapolis, MN.
- 11: SBM, Evidence, Fairmont, MT.
- 11: GICLE, Insurance Law for the General Practitioner, Savannah, GA.
- 11-12: ATLA, Criminal Trial Techniques, Las Vegas, NV.
- 11-12: SBT, Legal Assistants, Houston, TX.
- 11-12: SBT, Legal Assistants Family Law, Houston, TX.
- 11-12: ATLA, Proof of Damages, Philadelphia, PA.
- 12: CCLE, Delivering Legal Services, Cortez, CO.
- 15: PBI, Pennsylvania Appellate Practice, Gettysburg, PA.
- 16-18: ASLM, Medicine for Attorneys, Boston, MA.
- 16-18: SBT, Office Practice, Houston, TX.
- 16-25: KCLE, Trial Advocacy (Intensive), Lexington, KY.
- 18: GICLE, Insurance Law for the General Practitioner, Atlanta, GA.
- 18: GICLE, Will Drafting, Macon, GA.
- 18: ABICLE, Young Lawyers, Sandestin, AL.
- 20-24: NCDA, Trial Advocacy for Prosecutors, Boston, MA.
- 24-26: ABA, Appellate Advocacy, Boston, MA.
- 25: GICLE, Will Drafting, Augusta, GA.
- 25-26: ATLA, Proof of Damages, Philadelphia, PA.
- 28-6/4: NITA, Trial Advocacy, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the January 1984 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the

School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government

user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD BO77550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
AD BO77551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD BO77552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD BO77553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD BO77554	Criminal Law, Evidence/JAGS-ADC-83-11
AD BO77555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD BO78201	Criminal Law, Index/JAGS-ADC-83-13
AD BO78119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD BO78095L	Fiscal Law Deskbook/JAGS-ADK-83-1

AD BO77738	All States Consumer Law Guide/JAGS-ADA-83-1
AD BO77739	All States Will Guide/JAGS-ADA-83-2

Those ordering publications are reminded that they are for government use only.

2. Articles

Abramson, *Administrative Procedures for Resolving Complex Policy Questions: A Proposal for Proof Dissection*, 47 Alb. L. Rev. 1086 (1983).

Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 J. Int'l L., Winter 1983, at 27.

Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429 (1983).

Costantini, Mallery & Yapundick, *Gender and Juror Partiality: Are Women More Likely to Prejudge Guilt?* 67 Judicature 120 (1983).

Ford, *In Defense of the Defenders: The Vietnam Vet Syndrome*, 19 Crim. L. Bull. 434 (1983).

Friedlander, *The Foundations of International Criminal Law: A Present-Day Inquiry*, 15 J. Int'l L., Winter 1983, at 13.

Fromholz, *Discovery of Evidence, Confidentiality, and Security Problems Associated with the Use of Computer-Based Litigation Support Systems*, Legal Notes & Viewpoints, November 1982, at 43.

Galloway, *Law and Security in Outer Space: The Role of Congress in Space Law and Policy*, 11 J. Space L. 35 (1983).

Gazell, *Federal District Court Caseloads in the Burger Era: Rear-Guard Tactics in a Losing War?* 13 Sw. L. Rev. 699 (1983).

Gornall & Conboy, *United States Employment Taxation of German Nationals Working in the United States*, 16 Vand. J. Transnat'l L. 353 (1983).

Green & Hutton, *Jury Instructions: Theory of the Defense*, Criminal Defense, Sept.-Oct. 1983, at 18.

- Hatch, *The Freedom of Information Act: Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. Contemp. L. 1 (1983).
- Lamber, Reskin & Dworkin, *The Relevance of Statistics to Prove Discrimination: A Typology*, Hastings L.J. 553 (Jan 83).
- Lenow, *The Fetus as a Patient: Emerging Rights as a Person?* Am. J.L. & Med., Spring 1983, at 1.
- Mennell, *Community Property with Right of Survivorship*, 20 San Diego L. Rev. 779 (1983).
- Reese & Borgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 Ad. L. Rev. 313 (1983).
- Robinson, *Joint-Custody: An Idea Whose Time has Come*, 21 J. Fam. L. 641 (1982-83).
- Roster & Mabbitt, *Real Estate Transactions Under Revised Regulation Z*, Legal Notes & Viewpoints Q., August 1983, at 89.
- Roth, *The "Malmanagement" Problem: Finding the Roots of Government Waste, Fraud and Abuse*, 58 Notre Dame L. Rev. 961 (1983).
- Saltzburg, *Tactics of the Motion in Limine*, Litigation, Summer 1983, at 17.
- Squillante, *Uniform Commercial Code Bibliography*, 88 Comm. L.J. 391 (1983).
- Stern, *Charitable Contributions Update*, Legal Notes & Viewpoints, May 1983, at 13.
- Travis & Adams, *The Supreme Court's Shell Game: The Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation*, 24 B.C.L. Rev. 635 (1983).
- Twardy & Sanbar, *Recent Trends in Mental Health Law*, Med. Trial Tech. Q., Summer 1983, at 1.
- Watkins, *Enforcement of No-Strike Clauses Through Disparate Discipline of Union Officials: Another Dilemma in National Labor Policy*, 21 Am. Bus. L.J. 185 (1983).
- Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273 (1983).
- Zumpano & Marsh, *Creative Financing Arrangements: Risks and Liabilities*, 12 Real Est. L.J. 151 (1983).
- Comment, *Toward a New Ethical Standard Regulating the Private Practice of Former Government Lawyers*, 13 Golden Gate U. L. Rev. 433 (1983).
- Note, *Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation*, 81 Mich. L. Rev. 1641 (1983).
- Note, *Evidence Seized in Foreign Searches: When Does the Fourth Amendment Exclusionary Rule Apply?* 25 Wm. & Mary L. Rev. 161 (1983).

3. Judge Advocates Association Writing Competition

The Judge Advocates Association recently established an annual legal writing competition to foster professionalism and scholarly legal writing. The topic for the 1984 competition is "The Legal Limitations on the Use of Military Forces under the War Powers Resolution." Submissions should be in legal essay format, typewritten, double-spaced, on one side of 8½" by 11" white paper, and in quadruplicate. Each entry shall have a title page bearing the words "Judge Advocates Association Annual Legal Writing Competition—1984," as well as the name, military title, service branch, and address of the submitter. The submission may not exceed 4000 words, excluding footnotes and bibliography. Footnotes and bibliography must be in standard legal citation format of publication quality.

The competition is open to all active duty, active Reserve, and National Guard judge advocates and legal officers, except Judge Advocates Association officers and directors. A prize of \$250.00 and a recognition plaque will be awarded the winner in the spring of 1984. Additionally, a permanent trophy will be held for the year by The Judge Advocate General or Chief Counsel of the service branch of the winner.

Further, the winning entry will be submitted for publication in the winner's service law review.

Entries should be mailed to the Judge Advo-

cates Association, P.O. Box 488, Fairfax, VA 22030 and must be postmarked *not later than 31 March 1984*. The entries become the property of the Association and will not be returned.

By Order of the Secretary of the Army:

Official:

ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff